

On the Trail of the Bad Men

by
Arthur Train

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**ON THE
TRAIL OF THE BAD MEN**

BY ARTHUR TRAIN

NOVELS

THE NEEDLE'S EYE
HIS CHILDREN'S CHILDREN
THE GOLDFISH
THE EARTHQUAKE
AS IT WAS IN THE BEGINNING
THE WORLD AND THOMAS KELLY
THE HERMIT OF TURKEY HOLLOW
THE ADVENTURES OF ARTEMAS QUIBBLE
"C. Q."—IN THE WIRELESS HOUSE
THE BUTLER'S STORY

IN PREPARATION

MORALS À LA MODE
THE BLIND GODDESS

STORIES

TUT, TUT! MR. TUTT
BY ADVICE OF COUNSEL
TUTT AND MR. TUTT
TRUE STORIES OF CRIME
McALLISTER AND HIS DOUBLE
MORTMAIN

ESSAYS

ON THE TRAIL OF THE BAD MEN
THE PRISONER AT THE BAR
COURTS, CRIMINALS, AND THE CAMORRA

ON THE TRAIL OF THE BAD MEN

BY
ARTHUR TRAIN

SOMETIME ASSISTANT DISTRICT ATTORNEY, NEW YORK COUNTY
AND SPECIAL DEPUTY ATTORNEY-GENERAL, STATE OF NEW YORK

"I had not known sin, but by the law."

—Romans 7:7



NEW YORK
CHARLES SCRIBNER'S SONS
1925

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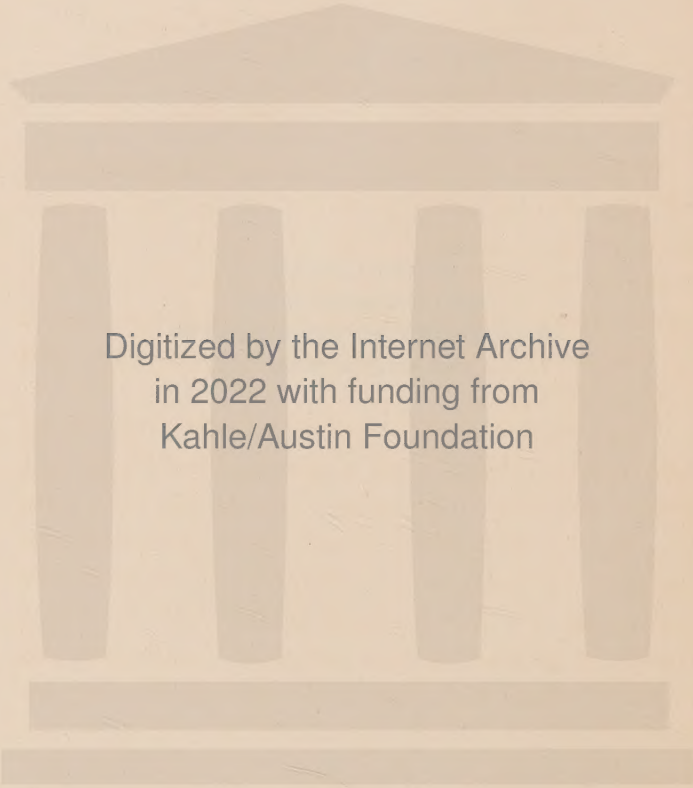
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TO ANY LAWYER
WHO BUYS THIS BOOK
IT IS AFFECTIONATELY DEDICATED
BY THE AUTHOR



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PREFACE

Concerning Lawyers

*Know ye not, brethren (for I speak to them
that know the law), how that the law hath
dominion over a man as long as he liveth?*

—Romans 7:1

It had been my intention to suffer the publication of this treatise without alteration in the original text, or any supererogatory comment of my own, however valuable, but a casual inspection of the proof sheets, induced by a congenital abhorrence of misplaced commas, disclosed a paradoxical and Titanic omission.

I had written a supposedly exhaustive opus upon bad men, bad laws, upon women good and bad, bad beasts, including dogs, pigs, cows, cocks, cats, rats, lice, leeches, and other vermin, even upon malignly disposed physical objects; but for some extraordinary reason, in my fulminations against bad men and things in general, I had somehow overlooked the most notorious bad men of all—to wit, the lawyers themselves—the class to which I myself once belonged by birth, education, and evil inclination, and among whom for so many years I had lived and moved and earned a dishonest living.

That so exhaustive, not to say so monumental, a work should be given to posterity with such an obvious defect is unthinkable, and indeed, now that

the matter has been called to my notice, I shall be glad to take this opportunity to tell a waiting world what I think of law and lawyers.

It was my natal misfortune to arrive in Boston at a period when all male children were thought ordained of God to be lawyers. There may have been other legitimate occupations in those days, but they were not brought to my attention, and, since there were as yet no telephones, the telephone directory had not been classified.

Every morning, at exactly twenty-nine minutes past eight, my father opened the door of our house at 227 Marlborough Street and descended the short flight of steps from what was called "the vestibule," carrying in his right hand a bag of green baize supposed by the uninitiated to contain important documents, such as wills, leases, deeds, contracts, *et al.* (it will be observed that the Devil's Habit is still strong in me), and started walking toward the gilded dome of the State House. Coincidentally, simultaneously, their movements accurately synchronized, every alternate door on the same street opened to allow the owner, lessee, or occupant likewise to appear holding a similar bag of green baize. Even when primarily concerned with the quality of my Walker-Gordon milk, I was never fooled by any of these rascals. My father's bag had no vital papers in it. It held merely a heavy leather case containing a fistful of horrible black cigars and a copy of *Puck*. I had tasted the cigars.

Like all others of my sex and generation I was

brought up to believe that only through the law could I attain economic and social salvation—"the law having a shadow of good things to come" (Hebrews 10:1)—and in pursuance of that delusion I spent some eleven precious years in being "fitted" for the bar; that is to say, I attended various football games and "beer nights" and incidentally read, marked, and got mental indigestion from several thousand so-called cases as compiled by divers learned professors. Thus, after working perhaps two hours per diem for three years and after being tutored by a highly paid coach, who was much too wise to bother himself with the practice of his legitimate profession, I managed to pass my law school and, later, my bar examinations, and became thereby entitled to call myself a bachelor of laws.

I had, it must be confessed—in open disregard of the adjuration not to "drink and forget the law" contained in Proverbs 31:5—nearly got rooked and thereby blighted a promising career. For in a moment of frivolity induced by a modicum of alcoholic stimulant I had answered the vital question of, "Give an example of the ownership of an animal in common," by the illuminating statement that the only recorded instance of such ownership of an animal in common was to be found in Mark Twain's "Pudd'nhead Wilson," in which the hero remarks that he wishes he own'd half of a certain yellow dog "'cause if he did he'd shoot his half." I was later informed that only by the grace of Blackstone and

my extraordinary familiarity with the mysterious doctrine of *Cy Pres* had I been saved from the outermost darkness of the pit.

But from this incident it should not be inferred that I took the law lightly. I merely took it easily. And doubtless it was this circumstance that enabled me at a later age to discard the advocate's robe so gracefully. "For through the law am I dead to the law." (Galatians 1:19.) Yea, dead and buried, although risen again in the guise of a man of letters and with a posthumous reputation as a lawyer which I never had in life and which I certainly never deserved!

I suppose in fairness to the profession as a whole I should at once confess that I was engaged in the worse side of it—that of litigation—and that I did not find it spiritually improving. For twenty-five years, in company with a miserable minority of the fifteen thousand other lawyers in the City of New York, which affords more carrion upon which the legal vulture may feed fat than all the rest of America combined, I lived upon the crimes and weaknesses, economic disasters, and sexual entanglements of my fellow men until I had learned to look upon any one not involved or at least involvible in legal complications much as does the medico to whom a sound and healthy human being seems a total loss. "Woe unto you also, ye lawyers! For ye laide men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers."

Nevertheless I had a burden, and a grievous one, which was my inability as a lawyer to express my own mind, and the fact that I was rapidly losing whatever individuality I had ever possessed; was in short becoming a mere composite or echo of all the other lawyers who had lived before me, even from the beginning of the world. For how can it be otherwise with us unfortunates, when we are not permitted to decide any point upon its real merits or as gentlemen and sportsmen, when we cannot advise our clients according to the standards of ethics, morals, or even "justice," but must, irrespective of the common sense of the matter, perforce be bound by the idiosyncratic decision of some irascible bigwig several hundred years gone by, which has kept on growing like a legal stalactite upon which our misfortune is about to crystallize as the final drop?

In all other professions anything in the nature of a discovery is greeted with applause or at least accorded the compliment of jealousy. Not so in the law! No lawyer ever yet arose before a bench of judges to say: "Your Honors, it is my privilege to lay before you an entirely new idea!" No lawyer, even if he has an idea, ever has the temerity to disclose the fact. Should he do so he would instantly be hailed as a lunatic. Instead, he arises, coughs deprecatingly, and murmurs: "As your Honors are well aware, this point was definitely settled in *Snooks vs. Mooks*, 1 King Alfred, 639, which has been followed ever since by a long line of authorities with which you are all perfectly familiar."

Whereupon his opponent gets up and says: "My learned brother has entirely misconstrued *Snooks vs. Mooks*, which was overruled several hundred years ago by the dictum of Lord Chief Justice Squabble in *Bellow vs. Bawl* and has not the slightest application. The controlling authority here is *Shadrach vs. Abednego*, 91 *Babylonian Reports*, 273."

Of course it is much easier to make *Snooks*, *Mooks*, *Shadrach*, and *Abednego* work for us than to use our own brains, but we lawyers pay the penalty by being forced to suppress, at much personal discomfort, whatever originality we may have been born with. Bernard Shaw would make a great lawyer—but no judge would listen to him. We have all labored under the curse of a vicarious solemnity for a thousand years. Is it surprising that we often appear inhuman when we have lost by attrition at least half our human qualities?

In order to satisfy his client's requirements a lawyer must conceal all his natural high spirits, imagination, and interest in the lighter and more valuable side of life. Once a client perceives a gleam of humor in a lawyer's eye or learns that he does cross-word puzzles, he vanishes through the outer door. Hence, from constantly inhibiting our ordinary instincts, we become cautious, taciturn, and unenthusiastic. We learn early in the game that what a man doesn't say can't hurt him—except to give him indigestion. And can we be blamed for being fearful lest some forgotten dictum arise to flout us on the jaw?

Yet, paradoxical as it may seem, while professional caution induces in us lawyers a chronic verbal repression, once give us paper and ink and we become utterly abandoned. Now at last we can make up for all those hours when with lips tightly compressed we have let the other fellow talk. And because we are lawyers first and human beings afterward, we can hardly be expected even in moments of literary ecstasy to discard the jargon of our profession—that “lawyers’ cant” which, as Bentham said, “serves them, at every word, to remind them of that common interest by which they are made friends to one another, enemies to the rest of mankind.”

As the reader has already discovered from perusing this preface, a lawyer makes the worst author in the world—if for no other reason than that he has become so habituated to the artificiality, the obsolete phraseology, the redundancy and reiteration of the legal vocabulary, that he could not escape from them if he would. A lawyer is as tautological as a cuckoo clock.

So that it is really not the lawyer’s fault if in these modern days, with a cigar in his mouth and a helpless stenographer chained on the opposite side of the desk, he sits and discharges a flux of meaningless and useless words that fill page upon page of banker’s bond and bring confusion to the brain of the sanest client. For originally that was the lawyer’s devilish purpose. He did not intend things to be too simple, or what credit would there be in straightening them out? So with a sufficient number of saids,

aforesaids, hereinafters, and before, *sics, et seq.s, supras, infras, et al.s*, and whereases—how the dog crossed the road became the very devil of an affair.

But that was only one of the many devices employed by lawyers under what Bentham called “the fee gathering system for promoting the ends of established judicature at the expense of the ends of justice”:

“Every sham science, of which there are so many, makes to itself a jargon, to serve for a cover to its nothingness, and, if wicked, to its wickedness: alchemy, palmistry, magic, judicial astrology, technical jurisprudence. The object and use of language is to convey information: information which, in some way or other, shall be of use: for which purpose, it must be true. The object and use of lawyers’ language is twofold: partly to prevent information from being conveyed to certain descriptions of persons: partly to cause such information to be conveyed to them as shall be false, or at any rate fallacious: to secure habitual ignorance or produce occasional misconception. Misconception, as will be seen, is on those occasions a sort of improvement upon ignorance: all the purposes of ignorance are served by it, but in a more exquisite degree. . . .” Even I could not improve upon that!

Legal verbalization has decreased, but has by no means been cured, since Bentham’s time. “Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered.”

This surely is bad enough, but the true horror of it becomes apparent only when we consider that under our system of jurisprudence it is the worst and not the best form of expression which is approved and perpetuated, becoming an unalterable precedent for all time to come. It is brought about in this way. Some learned judge delivers a charge so bad as to give hope to the lawyer upon the losing side that by appealing the case he may secure a reversal. So he prints the charge in his brief and argues the point before the judges of the Court of Appeals, who, after thinking it over, say in effect: "Well, it is true that our learned brother's charge down below was pretty damned rotten, but, although it was almost bad, it wasn't absolutely bad, and on the whole we guess we'll let matters stand as they are."

Now behold what happens! This charge was as bad as it could be without being actually reversible, yet, having been approved by the pundits of Albany, it becomes a model for the bench at large; hence, much of the law given to our juries is the worst law that can be found and yet be law at all.

And this same thing is true of the phraseology of many legal documents—only the worst are likely to receive the official approbation. For if a lawyer sits down and writes a will or a deed or a contract that is perfectly plain and simple, nobody ever hears of it, whereas if he be a dunderhead and fill his pages with a lot of hocus-pocus and technical legal jargon which nobody can understand, it is carried up for

interpretation to some learned tribunal in order that the interested parties, including the lawyer who drew it, can be told what it is all about. And the court having finally declared that all this rigmarole really means that John killed James with an axe, or that Peter has agreed to sell Paul his corner lot, or that Uncle Thomas intended by all his saids, aforesaid, whereases, hereinafters, and befores to leave a hundred dollars to his brother William's child—now, therefore, and because of this, to wit, James and Peter and Uncle Thomas must needs go on for all eternity killing and selling and devising with ten words instead of one and with sentences which run all around Robin Hood's barn instead of going straight in at the door.

This peripatetic and plethoric voluminosity of expression has left its curse upon all our circumlocutory brotherhood. Granted that one of us is daredevil enough to chance committing himself on some trifling matter, he will quickly lose himself in the forest of his own verbiage and be floundering there long after you are in bed and asleep.

A lawyer who spends most of his time in court is apt to delude himself into the belief that to be constantly arguing about things is amusing to other people. He enjoys it, why shouldn't everybody else? These so-called "trial lawyers"—of whom I was one—are well named, for they are sore trials to their families. Needless to say they make the worst husbands in the world, for they are irritable, caustic, grouchy, cantankerous, and ill-mannered,

insisting upon quarreling over the most inconsequential matters, demanding a "yes or no" answer when nobody cares one way or the other, hammering at and refusing to drop a subject until they have forced an admission of their correctness or driven everybody else out of the room. They do not allow their wives enough money, and they cross-examine them and their offspring as to where they have been and what they have been doing, until the poor things have no escape except by prevarication or homicide.

I have even heard uninformed and evil-minded people assert that by the time a lawyer has reached the age of forty-five he is either a millionaire, a jailbird, or a mummy. This of course is a libel, but I admit that most of us die of hardening of the arteries. We are never hanged. We reserve that final experience for our clients.

Had some wise person explained all this to me when I was young—"for I was alive without the law once" (Romans 7:9)—it would not have taken me twenty-five years to find it out for myself. But at length, like Saul—who was also a natural born prosecutor—I saw a great light and I gave up persecuting the innocent people who had been the victims of my cupidity, egotism, verbosity, and bad manners. Thereafter, as the prophet Jeremiah remarks, "they that handle the law knew me not." But it is too late for me to make compensation to those I have robbed, or amends to those whose feelings I have hurt by my needless severity and hardness of heart. It shall not be said of me in the language of the

Proverbs that "they that forsake the law praise the wicked." I do not praise the wicked. It is not my custom to eulogize the bad men upon whose trail I am set. No, I only plead that in the case of many of them—including lawyers—there are extenuating circumstances arising out of the very nature of their badness. As for myself, I can only apologize to the multitude of kindly folk whose feelings I have hurt and endeavor to counteract the evil I have done by an exaggerated amiability for the rest of my life.

"Nay," to quote again from high authority, "I had not known sin, but by the law."

HISTORICAL NOTE: After writing the foregoing I immediately resigned from the Association of the Bar. But, to my surprise, that august body refused to take my resignation seriously. I am wondering if they would have pursued the same course had they first read this preface.

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I

ON THE TRAIL OF THE BAD MEN

INTRODUCTORY

Speaking of "bad men," here is a letter from the county judge of Morrill County, Nebraska, referring to one of the many varieties of such indigenous to his jurisdiction.

COUNTY COURT OF MORRILL COUNTY, NEBRASKA

———, COUNTY JUDGE.

Bridgeport, Nebraska

Jan. 6, 1922.

Arthur Train,

New York.

Dear Mr. Train:

In my young and salad days they tried a man, who was afterwards known as 'Packer the Cannibal,' for killing two men in Hinsdale County, Col. They found his victims partially devoured. Packer fled the county and afterwards was arrested in Montana and brought back and tried in Hinsdale County and convicted of murder in the first degree. His defense was that they were snowbound and starving, and that his two companions assaulted him with homicidal intent; that he objected to being made 'the skeleton at the feast' and beat them to it, as it were. However, this is only explanatory.

The trial judge in sentencing Packer used considerable rhetoric, described the scenery where the crime was committed, and painted in lurid colors the heinousness of the offense. A prospector afterwards told me of the judge's sentence and I give it in his own words. He said: 'The judge told Packer to stand up and Packer did so. Then the judge asked him if he had anything to say why sentence should not be pronounced against him. Packer hadn't. I don't reckon it would have done him any good if he had, for the judge was mad and he'd have sentenced him anyway. Then he says:

'Packer, you man-eating son-of-a-gun, you come to this county airly when men were very, very scarce, and the Face of Nature was unmarred by the hand of man. There were only three Democrats in Hinsdale County, and you totted two of them onto the top of the highest peak and killed and et 'em. Such conduct is inexcusable and onbecoming a gentleman. It is therefore the judgment of this court that you be hanged by the neck until you are dead and may God have mercy on your soul.'

I wish to remark in passing that Packer's sentence was commuted to imprisonment for life and that some few years afterward a Republican governor pardoned him out of the penitentiary. You see, Mr. Train, it was almost an even break that year between the Republicans and the Democrats in the election coming on and he pardoned Packer hoping he would get out and do something to reduce the Democratic vote.

Yours Fraternally

County Judge.

I

ON THE TRAIL OF THE BAD MEN

IT may sound foolish, but it was so. I was on a search for "bad men"—the genuine 45 calibre, bowie knife, long-haired variety—the sort you read about and see all the time in the movies. I had been hunched in a swivel chair nearly a quarter of a century. I was getting along. I knew a lot more about demurrers than I did about desert desperadoes; yet of the two I had always nursed a secret preference for the latter. In my inmost heart I had a sneaking conviction that I could jolly well have been a bad man myself. Had not my maternal great-grandfather narrowly escaped being hung from the yard-arm of his own clipper ship? I yearned to see one of those blood brothers of mine.

"If I am ever going to see a bad man," said I to myself, "now is the time, before they are all dead." And there was another thing! While prohibition might, in some cases, result in life extension, it might in others—in the case of bad men, perhaps—really bad men—prove fatal! There was no time to be lost.

I asked a friend of mine, who "produces" feature films, where he got his bad men.

"Bad men?" he repeated vaguely. "Bad men?" Then he leaned over and shouted to his assistant

through an open doorway, "Say, Harry, where do we get our bad men?"

"Harlem," succinctly answered Harry. "I just send a boy down to the corner with a two-dollar bill."

"No! No!" I cried petulantly, "you don't get me at all! I mean where would you go to find a real bad man—the kind that holds up a stage and shoots up a town—kills a man for breakfast, you know. The long-haired kind! Bret Harte stuff, I believe you'd call it—or Bill Hart."

A light appeared upon his bewildered countenance.

"Oh, you'd have to go out West for that!" he informed me.

"What part of the West?" persisted I, not to be bluffed off.

"Way out, down in the Southwest, near the border somewhere!" he answered with all the enthusiastic indefiniteness of one anxious to oblige. "I don't know exactly; Arizona, I guess. Isn't Tombstone in Arizona? I'd go *there*—Tombstone. Sounds bad, doesn't it?"

Further inquiry among miscellaneous friends seemed to substantiate him. It was the general consensus of opinion that the Southwest—the South-southwest, to import a nautical term—was the natural habitat for bad men. The souther and wester the better. For one thing, as a caption-writing acquaintance put it, it was easier for them to "escape over the border into the fastnesses of the

Sierra Madres." Everybody also agreed, without saying why, that Tombstone, Ariz., would be the very best place. "Tombstone? Why, of course! Naturally!"—that sort of thing. It couldn't but be convincing. The more I thought of it the more I became satisfied that Tombstone was it.

"I will buy a ticket to the nearest point to Tombstone that a Pullman will carry me," I declared. "I will look all around that part of the country, and if there is a bad man anywhere about I will make him my own."

The ticket-seller said Douglas was the nearest place to Tombstone. Moreover, it was exactly on the border—couldn't possibly be more southwesterly. I did not ask him about bad men. I suspected that if I did he might call an officer.

A couple of bad men got on at 125th Street, and for a while I thought maybe they were going home to Tombstone; but they got off at Albany. I learned afterward that they were judges of the Court of Appeals. Thereafter no one who could have qualified as a bad man got either on or off. The entire train was filled to overflowing with Red Men, Odd Fellows, Elks, Whoos-Whoos, or Sacred Camels. I felt sure that somewhere, if I could only find it, there must be an order composed exclusively of bad men, with the insignia of a skull and bones rampant imposed upon a crossed dirk and revolver on a field gules.

We entered New Mexico and crossed the Panhandle. Up to that period I had innocently supposed

El Paso to be a wicked place, where Gringos and Greasers took pot shots at one another across the Rio Grande. In fact, I knew a story appertaining to that locality in which a gentleman figured who boasted of carrying on his person sixteen pairs of human ears once the property of certain other gentlemen who at one time or another had disagreed with him. I was disappointed. The desperados had all moved on further West, and El Paso had just opened the biggest concrete department store or stadium or something (perhaps all three) in the world. Not a single bad man! I did see one mounted cowboy in chaps, but he was hugging a thermos bottle instead of a rifle. Then as I sat in the smoker, gazing forth upon a yellow desolation pock-marked with prickly pear, yucca, and creosote—just the place for bad men—a stout burgher wearing an elk's-tooth watch charm and a derby hat, evidently sensing that I missed something from the landscape, and not wishing me to carry away any false impression, turned and said:

“Ever hear the story 'bout the cowboy who come down here to git married?—No? Seems his girl was comin' out from the East and this here cowboy he rode in to meet the train. Well, she was on it all right, and he got her off an' married her. He put her on a horse and started home with her, but on the way back she fell off and broke her leg. Next day he turned up at the ranch without her.

“‘Thought you went down to El Paso to git married,’ says the foreman.

“‘I did,’ says the cowboy. ‘But my wife she fell off her horse and broke her leg.’

“‘That was too bad!’ said the foreman. ‘Where is she?’

“‘Well,’ says the cowboy, ‘I was forty miles from a doctor, *so I shot her!*’”

The elk’s tooth shook convulsively, and I joined hilariously in the general laugh. At that moment I thought it a really funny story—full of local color. About a bad man, too! A harbinger of badder men to come. Now I wish that cowboy’s new wife had shot him.

Pretty soon after that we began to near Douglas. Until I got there I was pleasantly impressed with the scenery. From a distance it really looked like a pretty good stamping-ground for bad men. The town itself lies on a dusty plain entirely surrounded by tin cans and Mexican mountains. I say “Mexican” mountains deliberately. You can always tell a Mexican mountain from the fact that it looks as if it had been modelled in clay in the backyard, covered with a damp cloth, and then walked on by the dog. These mountains appeared to me to be just the places for bad men to “lurk” in.

But when I got off the train I saw that it was all a mistake. Douglas is no place for a bad man to lurk in at all. It is mostly churches—twenty-one, to be exact, a number denoting full religious maturity. And Sunday is the big day. Outside of houses of worship the town consists chiefly of cafeterias, drug stores, gasoline stations, graphophones,

and Jim Douglas. Also there are more flivvers parked along its curbs than anywhere else in the Southwest. I should say that a good counter might, by dead reckoning, count up to about 20,000. They are an essential feature of Douglas's metropolitan life.

Next to religion, and not necessarily inconsistent with it, Douglas is jazz mad. Every Saturday night they round up a seven-piece brass band in the imitation marble hall of the Gadsden Hotel, and cowboys and flappers have a cheek to cheek winter-green marathon, in which jaws and feet struggle for first honors. The natives themselves are silent men, but all day long and all night long from every cafeteria issue the strains of the talking-machine. No native of Douglas, no matter how "true and tender," can digest his food unless assisted by the jazzed version of an Indian war dance, with what Ed Wynn would call a "giddigidick" at the end of each verse.

I got off, as I say, at Douglas and immediately began looking eagerly around for bad men.

"Have you any bad men around here?" I asked the friend who met me at the station.

"Oh, yes," he answered, and my heart leaped with joyous anticipation, "only we call them 'bad hombres.' They live mostly over in Agua Prieta."

"Don't they ever come into Douglas?" I queried, feeling for my revolver.

"Oh, yes! Sometimes," said he, leading me hastily toward the hotel.

All the way I looked about eagerly for bad men,

bad hombres, or whatever they were called, but the only "spoor" I saw was a sign in one of the store windows reading: "Beautiful Baby Carriages almost worthy of that Chubby Little One."

It was a sad wallop. However, I almost immediately discovered what the flivvers were for. It is this way. In the Southwest the nearer you get to the Mexican line the arider the arid zone becomes. As one more erudite might say, prohibition is effective "inversely to the square of the distance from the border." Now Douglas is exactly on it, and hence absolutely dry. The place where they sell the drinks is called Agua Prieta and is in Mexico, which at this point is separated from the United States of America by a barbed-wire fence, having at a certain point a large hole in it.

At approximately five o'clock every afternoon the entire male population of Douglas cranks up, climbs in, and beats it for the hole, where a Mexican official named "Porforio" or "Emanuele" or something, is stationed to make sure everybody knows where it is. From then on until midnight the line of flivvers going to Mexico is continuous, at about which hour the alcoholic tide turns homeward.

The purpose of Agua Prieta is to reduce Arizona's aridity by irrigating the parched throats of Cochise County, which is pronounced as if it were a cheese—thus Ko-cheese. In a good country for bad men all rules are off, "j" is pronounced like "h"—and jam = ham.

I naturally wished to go to Agua as soon as possi-

ble, so, having deposited my bags at the hotel, we hailed a passing taxi and joined the procession of flivvers hurrying to the boundary, as if they all were afraid Mexico might go dry before they got there. Here on the front piazza of a tiny sentry box I saw reclining my first bad hombre—"Porforio"—the twin brother of Holbrook Blinn in "The Bad Man." As each flivver passed him the driver stuck out his head, nodded, and chirped, "All right, Porforio," and when our turn came I also thrust forth my features, nodded, and said, "All right, Porforio." It worked perfectly. Good old Porforio hospitably acknowledged my aridity, and I found myself in Mexico, feeling much as if I had successfully negotiated the wicket of a 44th Street gambling-house.

My breath came faster. Ha! Mexico! Now I was going to see something! Everywhere were signs—"White House Club," "Nacozari Club," "American Club," "Brook Hill Bar," "High Life," "La Experiencia"—obviously haunts of the baddest hombres. From the open doors came the strains of "Say It with Music" and "Do It Again!" The place reeked of sin. My friend, however, did not share my optimism. At that hour, he explained cautiously, bad men were apt to be on their good behavior. It was even sometimes difficult to tell a bad hombre from a good hombre.

After an unsuccessful half hour I shared his opinion. Tremont Row, Boston, would have made Agua at its worst look like a Sabbath morning in the

Plymouth Colony. The fiercest den of vice which we penetrated contained only a dough-faced Mexican girl in a mantilla tangoing with a cowboy, while a hybrid youth languidly tinkled the yellow keys of a piano, above which hung a sign reading, "Don't forget the Kitty, it's thirsty." There wasn't a thing in Agua that wouldn't have been passed without hesitation by the "National Board of Censors." I was chagrined about another thing. The drinks cost a dollar a throw.

I was on the point of abandoning my quest and returning to the United States when my friend timidly hazarded the suggestion that maybe I would like to drop in at his club—the "Mexican Club"—or, as they call it, "El Club Social de Agua Prieta, Sociedad Anonima." He apologized for the probable absence of bad men there by saying that the club had a very exclusive membership. By that time I did not care. I knew I was in the wrong pew. But he was right about that Mexican club. If it hadn't been for the official Mexican eagle holding in its grasp the official Mexico rattlesnake over the fireplace I might even have thought it was an American club pretending to be a "sociedad."

From various and sundry inscriptions on the walls I learned that there was "no gambling allowed" and "no credit," which recalled to my mind the couplet once ornamenting the façade of a certain Southwestern hostelry:

"To trust is to bust, to bust is hell;
No trust, no bust—no bust, no hell."

In front of a polished rampart defended valiantly by three genuine New York barkeeps leaned a group of mining engineers from Nacozari and Bisbee and a scattering of the No. 1 Boys of Douglas. Each of the latter held a small market-basket. Later in the evening it was whispered to me what these baskets were for—pie. The apple pies of Helen Gardiner, the sociedad's colored cook, are famous all over the Southwest. When one of the bad men of Douglas wants a drink he takes his little basket and goes over to Agua to buy his wife a pie. I sampled one of the pies and a few of the drinks, and began to appreciate Agua.

Here also I was presented to one of Douglas's leading citizens, affectionately known as "Daddy," a still husky old-timer who admitted to having lived almost everywhere in Arizona, one time or another, including Tombstone. At last I was "in contact"! Not a bad man, but one who, if luck were with me, could lead me to bad men, or at least tell me where to find them. I fell for "Daddy" on the spot. He expressed himself as pleased with my personality, and I hastily responded with protestations of my own regard for him, which resulted in the immediate ordering of several Mexican cocktails, exceedingly reminiscent of Times Square. I liked "Daddy" immensely—a good man to cling to for bad men.

"Listen, Daddy," I whispered in a tone meant to be confidential. "Do you know any bad men around this part of the country?"

He gazed at me affectionately.

"Bad men?" he answered. "Sure! You've come to just the right place. Of course, not right *here*, exactly. But 'most anywheres else. Go up to Bisbee or Benson or Tombstone, and you'll find a lot of 'em. They'd be glad to see you, too. Get hold of Biddy Doyle; he drove a government mule team in the Geronimo days. He'll talk to you!"

But I wasn't going to let "Daddy" off that easily.

"*You* tell me!—*You* tell me a story about a bad man, Daddy!" I urged.

"Daddy" indulged in a smile of wrinkled recollection.

"Well," he said at length, leaning heavily upon my shoulder, the better to command my right auricle, "the best story of a bad man I know is the one they tell down here about a cowboy who came into town to get married. If you never heard it I guess it'll get a laugh out of you. Seems he had a girl comin' out from the East on the train and he was to meet her in Douglas— Ever heard it?"

For an instant I wavered. Then at the look of eager anticipation on "Daddy's" face I shook my head.

"Shoot!" I said.

Douglas is not beautiful, but it is antiseptic. Tombstone—well, Tombstone by rail is a trifle inaccessible and the hotel accommodations primitive. So I decided to go there by motor and make my visit a fleeting one. This had the advantage of possibly meeting a bad man on the road who otherwise might be overlooked.

We encountered none, however, in the entire sixty miles, thirty of which—as far as Bisbee—is over a cement boulevard costing 2,000,000 dollars. The balance of the way is across desert valleys surrounded by mountains, once infested by Apaches. One of these ranges is called the “Huachucas”—pronounced as sneezed. The Kerchookas are also in Ko-cheese County. On the way through Bisbee I excavated Biddy Doyle and proposed that he should show me some bad men, or at least where they once had lurked. In reply he stated that that was easy, if I was going over to Tombstone. Tombstone had been rotten with ’em—them and Apaches!

I perceived that I was getting warm, in more senses than one. Out on that cemented desert the temperature was about 190 degrees plus. Also there was something the matter with our “one man” top. It needed twenty men to put it up—*bad* men—and we hadn’t got them. But Biddy did not seem to mind the heat. He waved across the shimmering sands toward a misty circle of jagged peaks. “Fort Kerchooka!” There was an army post up in the pass, he said, and in the old days he had carried in the supplies. The heart of the Indian country. Right over there was a place called “Cochise’s Stronghold”—yes, Cochise had “lurked” there. ’Most every day Biddy would come on the dead bodies of incautious prospectors with their noses slit and their tongues skewered with arrows. Where now one heard only the sweet strains of the graphophone

there once had echoed the long-drawn, milk-curdling yell of the highly uneducated Red Man.

As we purred over the macadam laid out straight through the mesquite, Biddy unlimbered his recollection and filled the circumambient atmosphere with tales of blood and guts. There really didn't seem much use of going further. But when I asked him if one could still find representative bad men in Tombstone, I thought he shied. They weren't all dead he admitted, but nobody had been really bad since about '85, and the boys were inclined to let bygones be bygones. Officially it was a closed season for bad men after that date. Anyhow, Judge James F. Duncan was the person for me to talk to—one of the earliest pioneers—an ex-justice of the peace.

Just about this time we ran onto a big colored tire advertisement right out in the cactus. We were, it stated, approaching the town of Tombstone. It also gave a succinct statement of how it acquired its name. Decoded and annotated by Biddy this appeared about as follows:

There had been a chap named Schieffelin—"Ed" Schieffelin—and he had a brother, "Al"—but "Ed" was the live wire, not bad but a regular he-man! His exterior appearance accorded with his character and was fully up to sample. He stood six feet two, wore his hair and beard long, patched his clothes with deerskin, and on state occasions sported high patent leather boots split at the knees and adorned with silver chains. He was a reckless fellow, a born prospector, sometimes acted as a government scout

on the side, and he ate Apaches alive. One day along in '77 as he started off toward the hills someone asked him where he was going.

"Just out to look for stones," replied he blithely.

"Well," scoffed the other, "if you go, Geronimo will get you, and the only stone you'll find will be your tombstone!"

But Ed was too cute for him! He ducked Geronimo and that very same day staked out claims that eventually he and "Al" sold for a million dollars, including the "Tough Nut," "Good Enough," "Lucky Cuss," and others. Having cashed in, "Ed" decided to exchange the wild and woolly for a metropolitan existence in the effete East. So he settled in New Jersey. The riot and hubbub was too much for him, and, having given or thrown away most of his fortune, he started off prospecting again. A year or so later, in '97, his body was found in a cabin near Cañonville, Ore., where he had died alone of heart disease, and, as he had requested in his will, he was carried back to old Arizona and buried "with his boots on" in prospector's garb, his pick and canteen by his side, a few miles west of Tombstone on the site of his original lucky strike. Chalk up one!

Soon after leaving the sign, and on the other side of a slight rise, I came unexpectedly upon Tombstone itself—or its remains—lying in the midst of the plain, a straggling collection of wooden houses and wide dusty streets lined with one-story stores with false tin façades and rickety wooden-pillared arcades. Biddy assured me it hadn't changed a mite

since '78, when it was born. It had died of lack of nutriment a few years later, but the intervening period was replete with homicidal activity. The brief existence of this metropolis of bad men was poignant, colorful, and picturesque. Only its husk remains, a relic of the old stage-coach days when Apache, outlaw, and sheriff united to make life equally hazardous for men both good and bad.

We strolled around past the office of the Tombstone *Epitaph*, the City Hall, the ramshackle sagging relict of the Birdcage Theatre, the ancient hostelrys known as The Billike and The Brown hotels, and the old Crystal Palace, once famous as a gambling-hell, now converted, as a sign naïvely testifies, into a (movie) "resort of polite entertainment" where the youthful Tombstoner can learn on the screen what the bad men really were like. Had it not been for the shade afforded by the wooden arcades I should not have enjoyed my stay in Tombstone. There was part of a sycamore tree in front of the "Can-Can" Restaurant, and I sat down under it with two ancient and desiccated local gossips.

It was now that I first learned that simply because a man was a sheriff, a United States marshal, or even a justice of the peace, it did not prevent him from being a bad man, a very very bad bad man. This is a notable fact in the exegesis of bad men, who, it appears, often, if not usually, sought for business purposes to become officers of the law. I should have known this already, because I am a member of the bar.

While, therefore, Bidly is searching amid the ruins for Judge Duncan let us pause and discuss the various congeries into which bad men are divided. Passing over bad Mexicans, bad Chinamen, and bad Indians, and coming directly to bad men proper, we find three general classes: (a) road-agents, outlaws, and professional gunmen, who by character and predilection are frankly disposed to violence; (b) sheriffs, U. S. marshals, justices of the peace, barkeepers, and gamblers, who though bad by nature figure upon the side of "sweetness and light"; the third class (c) is not necessarily (although it may be) composed of bad men, but consists of festive cowboys, miners, or any other playful or joyous citizens either artificially exhilarated or naturally exuberant, who seek to shoot up the town or wing Chinese laundrymen sitting—including younger sons of noble lords, otherwise known as "remittance men."

This subdivision of Class "C" is practically extinct, the last known survivor in southwestern Arizona having been "Lord" Darrel Duppa, who lived west of Phoenix on the "Dutch Ditch." His first appearance was in the Salt River Valley, in '68, where he worked at digging the "Swilling Ditch" with "Pump Handle John," Andy Starer, Bill Bloom, and "One-Eyed" Davis. According to all reports, he was a mysterious person of degraded habits and extraordinary culture, the dissolute and exiled scion of an aristocratic English family, supposed by some to be the lost Roger Tichborne—paid to keep away from home and to refrain from claiming his estate. Anyhow, he received a considerable

sum of money every three months from England and blew it in with a whoop. For a while he ran the stage station at the sink of the Agua Fria, where the guests slept on the dirt floor and the cook would yell from the kitchen door: "Hash pile! Come a-runnin' or I throw it out!"

Duppa had a friend named Henry Morgan, who kept a trading-post in the Pima Reservation. They used to spend his lordship's remittance together, and at the finish Morgan would always take his stand in the middle of the street and howl that he was a bad bad man, the whelp of an alligator and tiger, had a deadly gun, carried sixteen rifle balls in his abdomen, and that the whole world couldn't take him. "I fool 'em all! I fool 'em all!" he would yell, but, although he had killed several men at various times, a clever deputy sheriff could usually kid him into a peaceful journey to the calaboose. The historic crack every sheriff pulled was that he guessed the sixteen balls Morgan was talking about were codfish balls. When "Lord" Duppa was informed that his friend had been beaten to death by Indians, he sought to solace his grief in verse:

"Weep, Phoenix, weep; and well ye may,
Great Morgan's soul has passed away;
Howl, Pimas, howl; shed tears of blood,
And, squaws, bedeck your heads with mud;
Around his grave career and canter,
And grieve the loss of beads and manta."

Which effusion demonstrates incontrovertibly what a polished culture was his. Mark up two more!

I was pleased to find that in the old Tombstone days gamblers as a rule were not regarded as bad at all. As one of my new, if ancient, friends put it during an idle interval while tracing his initials in brown upon the board sidewalk:

"Gamblers? Hell! There weren't a decenter, quieter lot in the hull State." An emphatic hiss followed this preliminary announcement, after which my friend wiped the back of his hand across his mouth and proceeded. "Say, mister! You couldn't find better men anywheres than 'Preacher Frank,' Ben Belcher, Tom Barnum, 'Six-Toed Pete' or 'Caribou' Brown. No sir! Gentlemen they was, all on 'em! Some on 'em highly eddicated." Another hiss. "They'd allus give you a run for your money. 'Caribou' was gentle as a lamb. Never pulled a crooked card. When he died in '87 there wasn't a son of a —— in Tucson didn't go to his funeral! Ain't that so, Bill?"

Bill conceded that it was so. "Gamblers weren't bad men—but as fer sheriffs! I never cared for 'em! Say, tell him about the big day in '81."

"Well," agreed the first ancient, "the Earps and Clantons was the ones made Tombstone deserve its name. 'Long about '81 Wyatt Earp he got himself appointed deputy U. S. Marshal, and Virgil Earp he got the job of City Marshal, mainly, I guess, as a matter of convenience. They had the pants skeered off most of us. The only fellers who wouldn't recognize 'em as havin' particular authority was the Clantons—outlaw cowboys they was. Bad

men, maybe you'd call 'em. Rest of us—when Virg Earp tol' us to do somethin'—we jest hopped to it, but these Clantons they didn't care for nobody. There wasn't room here for both the Earps and the Clantons. No, sir. One on 'em had to go. The big day—the biggest we ever had in Tombstone—was October 26, '81. The four Clantons had come down from the Babacomari Mountains, where they lived, an' had left their hosses in the O K Corral—John Montgomery's Livery Stable—" he waved his hand toward an open doorway leading into what appeared to be a small garage a few feet distant from us. "They found out the Earps was layin' for 'em and planned to beat it to the rear gate that opens out on Fremont Street. Well, mister, they was jest leadin' out their hosses when five of the Earp crowd jumped out on 'em."

My elderly friend, with a lingering and somewhat regretful penultimate hiss, arose stiffly.

"You better come along so's I can show you the exact spot," said he, leading me through the garage half-filled with decrepit flivvers to an open space behind. He walked across this and dug in his heel.

"Virg had a sawed off shotgun. 'Throw up your hands, you sons of ——' he yells, but as the Earps began shooting the same instant, they jist naturally got all the Clantons—'cept Ike; he got away. Well, mister, the Earps marched up street and surrendered to Justice of the Peace Spicer, an' he discharged 'em all as havin' acted as officers of the law in the proper performance of their duty." He sighed.

"That was a big day for Tombstone. Bad men? Oh, I won't say as any on 'em was exactly what you call bad men, but—" He struggled manfully to extract his few remaining teeth from a tile of cut plug——

"Score nine more!" I said to myself.

The other old codger now hobbled forward explaining that this here Earp-Clanton affair wasn't the only killin' that had occurred at the O K Corral, by any manner o' means. The ground on which we stood was also hallowed for the shooting of Jim Burnett by Colonel Bill Greene. He reckoned I'd heard of Colonel W. C. Greene of Cananea Consolidated? Some Bill! Why, he cud remember when Bill come out and worked as a common miner in Tombstone and cut wood at fourteen dollars a cord. An' afterward he got to be worth thirty million!

I had met Colonel Greene in the East myself, and knew how by 1905 in spite of his early poverty he had employed 4,000 men and established a community of over 20,000 souls in the Cananea Mountains in Sonora, having in the meantime bought a large part of the northern section of it as a cattle range, besides building railroads and smelters. Colonel Bill was a gambler and a fighter, always enmeshed in litigation, his private car being usually attached in whatever State he happened to be traveling in. He never passed by a faro game, and the ceiling was his limit. Of huge physique and tremendous strength, he was always busy, always speculating for tremendous stakes.

He was a man of force, grit, big-hearted, generous, and reckless. If he saw anything he wanted he usually took it. His disregard of law necessitated his having practically the entire bar of Arizona in his employ. It is said of him that he never forgot a friend or—an enemy. That is probably the real explanation of his killing of Burnett and his acquittal.

"Happened this way," said the second ancient, now eager for his innings. "When Bill was ranchin' over on the San Pedro he was always at loggerheads with Jim Burnett about water rights. One day Greene's dam was blowed up and his little girl Helen and a friend of hers was drowned in the flood. Burnett wasn't there at the time, but anyhow Bill thought he was responsible, and he hunted him out down here and shot him right there in that doorway. I was standin' about where you are now, and I see Bill come out wavin' his gun and shoutin' 'Vengeance is mine: I will repay, saith the Lord.'"

"Was Greene convicted of murder or did he escape?" I asked.

"You mean on what ground he was let off?" said the nonagenarian finally. "I was on that jury and fer quite some while we couldn't just make up our minds. You see, we knew Jim hadn't blowed up the dam. So in the end we decided to acquit on general grounds—and call it temporary insanity, 'cause Jim always was a ——"

"Y'see, this here Burnett was a bad man," interpolated the original old codger.

"He sure was!" assented the other. "He was one

o' them justices of the peace. Lived over to Charleston. The San Pedro cowboys used to come in there regular an' shoot the roofs off the houses. Say, mister, Tombstone wasn't a marker to Charleston fer violence. The toughest nut I ever see was a judge, name of Krock. This judge found a feller named Schwartz guilty of murder and fined him a thousand dollars. Schwartz claimed it was too high, but Mark Smith—he's our senator now, ye know—Mark he told him it was dirt cheap. Schwartz decided it was too, after the posse come over from Tombstone to git him, and he moved out 'fore they got there."

"Ring up two more!" I muttered. Bad men were coming thick and fast now.

"'Member time he got after Jack Harrer?" chuckled the first old codger.

"Say!" the second old codger slapped his withered thigh, "you was askin' for bad men—! That there Harrer was a real desper-ay-do! The time Bill sees fit for to mention he come in crazy drunk and shootin' off his guns so's everybody ducked under their counters and round back of the house. But Krock, I'll say this much for the son of a —, he had guts. He walked right out to Harrer and pulled him off his hoss and took away his pistol.

"'You're drunk and disorderly!' says he. 'An' I find you guilty and fine you twenty head of three-year-old steers.'"

"Harrer paid him the steers, too," supplemented the first old codger. "It weren't long 'fore Krock

got to be a pretty rich feller—what with his tradin' in 'strayed' cattle an' all. I tell you, mister, bein' a justice of the peace gave a man opportunities in them days. Ever heard tell o' Judge Bean down to Pecos? I reckon you must ha' heard of him. He come out here early and settled when there weren't much of anything along the Santa Fee 'cept a few water-tanks. That's all there was at Pecos anyways. This here Bean was an ingenious feller an' claimed in his youth to have been in love with Lily Lan'try,— 'The Jersey Lily,' y' know. Well, out to Pecos he was justice o' the peace, postmaster, city marshal, town clerk, and coroner all in one. He put up a sign:

JUDGE BEAN

ALL THE LAW WEST OF THE PECOS
THE JERSEY LILY

But there wasn't much business and the judge he had a hard time to make both ends meet. One day the Santa Fee run down a Chinaman and killed him. They brought him in, an' Bean, in his capacity as coroner, sat on the body. When he looked in the Chinaman's pockets there was a revolver and fifteen dollars. That give the judge an idee.

“‘Set him up in that cheer,’ says he. So they did—propped him up, y' understand. Then Bean says: ‘Oyez! Oyez! The coroner’s court is adjourned. The justice’s court is now opened. Mr. Chinaman, you are charged with carryin’ concealed

weapons, to wit and of a truth, one gun of the form, style, and calibre known as a forty-five. Are you guilty or not guilty? The Chinaman just naturally sayin' nothing, Bean found him guilty—and fined him fifteen dollars!"

"But he weren't no bad man," interposed the other after a pause.

"Oh, no, Bean weren't no bad man!" assented the raconteur.

It was at this point that Bidley Doyle appeared with the sad news that Judge Duncan was out of town for the day. As a substitute, however, Bidley had brought with him another prehistoric inhabitant, who claimed the distinction of having been a justice of the peace himself in the very height of the town's most gory glory.

Even in his carpet slippers the "Judge" greeted me with dignity. He had, he admitted, lived through considerable excitement in the earlier days, considerable! Yes, he knew 'em all, the Earps, Clantons, Frank Leslie—the whole crew on 'em.

"I had some job in them days," said he rather proudly. "This Frank Leslie I mention—he was barkeep over to the 'Billike'—he was servin' drinks in one of them long white aprons they used to wear, and he looked out the winder one day and seen a feller—I forget his name. 'Excuse me a minute,' he says to them in front of the bar. So he puts down his bottle, takes off his apron and hangs it up, and then he steps over to the lookin'-glass and brushes his hair careful. Then when it's right to suit him he

slips his gun in his pocket and walks across diagonal ahead of this feller—slow-like—and then all of a sudden he wheels 'round and blows the top of his head off. You can see the very spot—right over there.” The “Judge” indicated an inequality in the roadbed. “Then, leavin’ the feller lying there dead, back he went, put on his apron, and finished serving the round of drinks.” The “Judge” paused and licked his lips, remarking that his feet hurt him considerable these days. Tact prevented my inquiring what was done with Mr. Leslie.

“Then there was Jerry Barton,” he continued. “Jerry, he run a saloon across the street down further. He was a whimsical sort of feller. He had two hosses and he was so scart somebody would steal 'em he built a trough in each window and hitched 'em outside so'd he could keep his eyes on 'em. One day when his back was turned two Mexicans stole the hosses. He come over and asked me where the sheriff was. Well, the sheriff was off somewheres else. So I says, ‘Why don't you go after 'em yourself?’ an' Jerry allowed he would. Well, next day he come back with the two hosses and a dead Mexican tied on each hoss.

“‘I came on 'em while they was asleep,’ he says.

“‘Well,’ I says—you see I had to appear kind of particular—‘why didn't you take 'em alive?’

“‘Oh,’ he says casual-like, ‘I shot 'em 'cause they packed better.’”

After an interlude, during which the “Judge” again adverted to his feet, Biddy skilfully manœuvred

the conversation around to "bad men" by way of their shoes. Yes, they were swell dressers, all right, the "Judge" said. Long hair? Yes, some on 'em wore long hair. Hip boots with high heels? Yes—and sometimes they were made of patent leather with scallops—decorations, y' understand; and hats with heavy silver bands to hold 'em on in a wind. Red shirts? Yes—if it pleased their fancy. Some liked one thing—waistcoats, for instance; and some another—neckties, maybe. Took a man with guts to be sheriff. "Shotgun" Johnson was that kind of a feller—used a sawed-off shotgun instead of a revolver. The idee, the "Judge" explained, was to get close up to your man and "paunch" him.

It was getting toward dinner time, and the "Judge" apologized for having to get along home. He shook hands with all the ceremony proper to an ex-member of the Cochise judiciary. Then as he relinquished his clasp a reminiscent smile wrinkled his aged countenance. Speakin' of stories, he said, it so happened he did know a real good one. Ever hear tell of the cowboy who come down to Tombstone to get married?

With rare presence of mind I kicked Biddy violently in the viscera, and in the ensuing confusion succeeded in making a clean getaway, leaving the "Judge" with his parched old lips half open. I could already hear the cracked voice triumphantly achieving the—"So I shot her."

As Biddy and I dodged around into Fremont Street we found ourselves directly opposite the office

of the Tombstone *Epitaph*. After what I had just heard, the name seemed singularly appropriate. Biddy asserted that it had been founded on May Day 1880 and that the name had been suggested by John Hays Hammond at a banquet given at the "Can-Can."

Evidently there had been nothing monotonous about Tombstone journalism in those early days, and editors had to exercise more than ordinary discretion about what they printed. When Pat Hamilton edited the *Independent* and Sam Pinder the *Epitaph* they got slamming each other so, Biddy said, that the merest decency demanded that something should be done about it. They were not Earps, Clantons, or Burnetts—not even U. S. marshals or J. P.'s. The decorum of letters and the editorial tradition demanded greater ceremony than usually observed on such occasions. It was universally felt that only a first-class duel conducted with proper attendant form and circumstance could meet the requirements of the situation. But nobody knew how a duel should be managed. However, there was a copy of one of Lever's novels in town, and after much study the details of procedure were arranged in accordance with information secured from and contained therein.

Accordingly, at dawn one morning the party set forth with all the blatant ostentation usual in such cases. Those citizens who did not accompany the funeral party remained behind to bet on who would be the one to be carried back feet first. Luckily, no

bets had to be paid, for Ned MacGowan and Billie Milliken, the seconds, became involved in such an altercation over the position of the principals and the choice of weapons that the duel threatened to turn into a mere common or garden shooting affair, and was finally declared off. Thereafter all parties sneaked back into town under cover of darkness and remained for days in hiding from the outraged Tombstonians.

The sound of a revolver shot brought us back on the run to the main street. A live bad man, maybe! But it was only the Episcopal Bishop of Arizona, who had blown out a tire opposite the Crystal Palace. The incident, however, collected a quorum of the surviving citizens, among whom Biddy discovered no less a personage than Judge Duncan himself, who, it appeared, hadn't left town after all.

The Judge, a sprightly youngster still going strong in his eighty-fifth year, is by unanimous consent not only the grand old man of southwestern Arizona but admittedly the greatest living authority on anything connected with Tombstone or vicinity. He had, he informed us, arrived in Tombstone in October, 1879, just in time to see a man murdered, which, while fairly startling to him, seemed to be greeted with entire indifference by the community.

"In those days our present city," said the judge, indicating the shimmering expanse of white dust bordered by the wavering wooden pillars of the ramshackle arcade, "consisted of forty tents and cabins with a population of about one hundred souls.

Mike Gray, the local real estate agent, waited upon me on my arrival and offered me all the lots I wanted at five dollars each. Anybody could have been the John Jacob Astor of Tombstone for a few hundred dollars. 'Pie' Allen had a store over on that corner, and further up the street landlord Billike had erected the Cosmopolitan Hotel, the most imposing structure in the camp. Within a year, sir, there were no less than a thousand residents and soon we had nearly fifteen thousand!"

"How many of these would you say were bad men?" I inquired passionately.

Judge Duncan smiled tolerantly. It was hardly seemly for him, he suggested, to discriminate.

"Besides," he said, "I did not remain long in Tombstone at that time—only a month, in fact. I moved over into the Mule Mountains. I was justice of the peace in Mule Gulch for ten years. But of course I kept in touch with affairs here. Tombstone enjoyed a period of great prosperity from 1879 to about 1885. The mines looked like bonanzas, and people were pouring in here from Tucson by the hundred. When I got here in '79, as I said, there were about a hundred residents; two years later there were a hundred and ten liquor licenses. All these mercantile establishments you see about you"—he nodded up and down the somnolent main street, where at that moment nothing animate was visible except one decrepit pointer dog—"were devoted to the sale of intoxicating liquor. This street was just a double row of saloons.

Fourteen faro banks ran day and night. Next to mining, the principal industry was gambling."

Judge Duncan stated that the way the money collected for liquor licenses disappeared—about a quarter of a million dollars—was a scandal, all due to the business incapacity of the supervisors. Tombstone, you see, was in Pima County, and the fees went direct to the officials. By '81 County Recorder Carpenter down at Tucson was making about \$3,000 a week in mining fees from Tombstone, which often sent down as many as one hundred locations a day. Sheriff Paul had almost as soft a thing. But both died poor. I gathered that most people did die poor—and young.

The judge, among other items of interest, explained that the name of the county—Cochise—was a mistake. It really should have been spelled Cachise. There was considerable rumpus about it in the Legislature, but after the bill giving the county its name had been passed it seemed too much trouble to change it, it being generally conceded that nobody knew how an Indian name should be spelled, anyhow. After the fires in the Grand Central and Contention hoists and the flooding of the lower workings of the mines, Tombstone began to disintegrate. Most of its population drifted away to other camps, nine-tenths of its buildings became empty, hundreds of frame houses were torn down and used for the erection of other boom towns elsewhere, and the real estate market went to pot.

But there was life in the old town yet, as is shown

by the fact that Judge Duncan had moved back there from Mule Gulch and gone into business as late as '89. He had, he conceded, held most of the municipal offices at one time or another, and I seized this opportunity to inquire as to the authority exercised by justices of the peace in the early days—not those who were “bad,” of course. The judge admitted that at best it was somewhat rough hewn. There had been a lot of queer stories about some of 'em.

He had heard, he said, of one J. P. up at Mineral Park, in Mohave County, who had sentenced a man to be hanged. Over in Tempe there had been one who had divorced a Mexican couple whom he had united shortly before; and another who had pronounced an act of Congress unconstitutional. In Graham County, there being no minister handy, a justice of the peace who wished to indulge in matrimony had performed his own marriage ceremony, asking and answering all the necessary questions, and then issuing himself a certificate.

Then, like a bolt out of the zenith, the judge turned to me and said suddenly:

“Speaking of uniting in marriage, did you ever hear the story of the cowboy who came down to Benson to get married? It seems he had a girl——”

But at that moment I saw an imaginary friend over by the Billike House.

“Excuse me, judge,” I interrupted, “there is some one over there I have to speak to!— By the way, could you tell me where to go to look for a bad man if I wanted to find one?”

Judge Duncan seemed a trifle offended.

"You had better look in the cemetery!" he replied stiffly.

Acting upon the judge's somewhat cynical suggestion, I motored a mile or so down the road to where the old-timers lie under the blazing sun by day, under the wide and starry sky by night. It is a forlorn spot, barren of vegetation, save for here and there a soda weed, its shallow graves piled high with rock to thwart the efforts of the coyotes at unholy excavation. Most of the "stones" are of wood, oiled to prevent decay, and rudely carved by hand, telling in some instances of how those buried there came to untimely ends by violence—by pistol shot in barroom brawl, by poisoned Apache arrow, or by premature blast in mine. Bad men? Nay, rather, brave men—let us say!

Biddy tried unsuccessfully to find the headstone of a youth whose bereaved parents, having ordered one from a local painter, found that the inscription had been made to read:

<p>T. JONES Died July 3, 1880 Aged 777 years</p>
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The painter, when called upon to explain why he had put "777" instead of "21" stated that being weak on "2's," he had used "7's"—three sevens being equivalent to twenty-one—an explanation which is said to have completely satisfied everybody.

The tombstones of Tombstone are in some respects its liveliest features of interest. One wooden shaft, painted white to resemble marble, had fallen down and into several pieces. I patched it together and restored it to an upright position. "Only sleeping" it said. Perhaps that is true of Tombstone itself.

We stopped on our way back to see the old "thoroughbrace" Modoc stage, which still stands, dusty and dilapidated, in a shed belonging to Mrs. Martin Demorest, widow of the last Wells Fargo agent. After all, it was only thirty-odd years since it had rolled in from Benson amid a cracking of whips like revolver shots, and a similar volley of oaths as the driver reined in his six galloping steeds in front of the O K Corral. Thirty years? A mere nothing! It was incredible that all the bad men could be dead. A bad man who had reached maturity in Tombstone's most lurid era, would now, were he alive, be but sixty—the prime of life!

I pondered upon this as we left the town behind us and whirled across the desert toward Douglas.

"Biddy," said I, as we drew in at the depot where I was to take the train, to prosecute my search for bad men further West. "Biddy! Tell me the truth. What has become of all the bad men?"

He mumbled something evasively as he handed me my valise, and I gathered that he meant me to infer that those who had not met death in their heyday by arrow, knife, or rope's end, had moved to

distant lands, lingered on in prison cells, or died in the fullness of years. I was not satisfied. No, no! They could not all be dead—or in Hollywood! Surely, of all these wicked gunmen and gamblers, road agents and marshals, justices and judges, sheriffs and saloon-keepers, some must have survived. Had I seen a bad man?

"Biddy," quoth I, as the "Golden State" roared in from El Paso, "who were those old codgers I met up in Tombstone?—the ones that took me to the O K Corral and showed me where the Earps wiped out the Clantons?"

It was his last chance to tell me the truth. Would he take it? Would he shatter romance with realism?

"This train for Tucson, Maricopa, Yuma, Gila Bend, and Los Angeles. Pullman tickets, please!" shouted the conductor. The porter relieved me of my bags. I still waited with one foot on the step for Biddy's reply.

"Haven't I seen any bad men—or men who once were bad men?" I insisted. His answer was inaudible.

Just over our heads on the observation platform stood a group of Easterners "seeing America first." One was telling the others all about it. Above the escaping steam his voice rose triumphantly:

"They tell a good story out here about a cowboy who came down to Tucson to get married. It seems——"

And I realized that that cursed cowboy was the nearest to a bad man I had got.

II

THE DISTRICT ATTORNEY

INTRODUCTORY

*"When I was a lad I served a term
As office boy to an attorney's firm ;
I cleaned the windows, and I swept the floor,
And I polished up the handle of the big front door."*

Which is to say that I served as an assistant or deputy assistant under every district attorney of the County of New York from 1900 to 1916; also served as a deputy assistant attorney general and as a special deputy attorney general of the State of New York on various occasions, the most important being in Queens County in 1910 during an attempt on the part of Governor Hughes to make Long Island City and its political environs a better and sweeter place to live in.

It was during this episode that I encountered a genial servant of the public who had casually entered upon his check stubs various items as "graft." Since the latter belonged to the same political fold as myself he took it as a personal grievance that he should have been himself indicted. Indeed, it should be said that the inhabitants of Queens County heaved a common sigh of relief when, the opposite party having come into power, I was summarily removed from so advantageous a spot to make trouble. While the writer's experiences may have left him a trifle cynical in regard to office-holders in general, it may be affirmed that his belief in the integrity of the human race at large has remained unshaken.

II

THE DISTRICT ATTORNEY

THE "police play" and the detective story—not to mention even higher forms of dramatic and literary expression—have made the public prosecutor a familiar figure. Every child who attends the movies knows that a "district attorney" is an unscrupulous villain in league with all the forces of evil while masquerading as a St. George. His usual object is to get rid of his rival for the hand of the governor's daughter, by convicting him of a murder of which he is innocent, and to hurry him to the electric chair. This enables the governor to issue a reprieve for the hapless victim in the final reel and, by removing the district attorney from office, to cast him into the outer political and social darkness where he belongs.

The dramatic possibilities of the prosecutor as literary material were not fully realized by authors and playwrights until the appearance of the gallant figure of William Travers Jerome in the earlier years of the present century. Almost immediately the curtain to every second act arose upon a ground glass door bearing the then mystic words, "District Attorney's Office." From said door emerged at the crucial instant an official Sir Galahad—brave, resourceful, always young, and clad in a nobby business suit and bowler hat. He smoked cigarettes;

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the Senatorial villain puffed cigars. But there was nothing to it. Galahad always landed a knock-out on Beelzebub's solar plexus, and the play ended with the powers of darkness on the run.

Everybody got tired of Galahad after a while, and by a natural involution, due to the necessity of giving the audience the customary jolt in the last act, the pure and stalwart young district attorney had perforce to be transmogrified into the villain he now is. He may, in a year or so, reacquire his virtue, or he may be thrown out entire as "old stuff." At present, however, he is a bad egg, and we all know it.

Most people, having a limited personal experience, gain their impressions of life and character from fiction and the drama, spoken or celluloid. They are also influenced by tradition, and the traditional prosecutor is a bull necked gladiator with an under-shot jaw, who has no mercies, even if he be not destitute of bowels, and who would cheerily send his grandmother to jail for stealing a crossword-puzzle book.

The public are not altogether to blame for this. The district attorney, after a certain point in legal proceedings, should and does become a sort of legal gladiator. This is partly because all court trials still retain a distinct flavor of their origin. They are actual contests—no less bitter or intense because conducted according to the Queensberry rules of legal etiquette. For thousands of years the only way of punishing crime was by doing it one's self.

Private vengeance was the basis of all criminal procedure. The aggrieved and the aggressor simply fought it out with whatever weapons they had. Even after the institution of organized judicial procedure a recognized method of deciding whether or not a person charged with murder was guilty was by handing him a club of a certain standard shape, size, and weight, supplying his accuser with another, and letting them "go to it." If one of the parties did not happen to be handy with clubs he was allowed to put in a substitute before the gong rang, and the thing was fought out by proxy. The combat lasted "from sunrise to starlight," or so long as either survived. This right of "trial by battle," or the "appeal of death," was not abolished in England until 1821, in which year a defendant accused of murder having claimed it, the Court of King's Bench held it to be still existent. However, as the official clubs had been accidentally mislaid by some Beefeater in the Tower, and could not be found, the prisoner, having been convicted in the common or garden way, was hanged after all—with due legal apologies.

This had always been the historic way of settling difficulties not only between individuals but between tribes and nations as well. Did not Hector fight with Achilles between the drawn up Greeks and Trojans? Did not the Israelites and the Philistines leave the issue to David's sling and Goliath's spear? Trial by battle was by no means peculiar to Anglo-Saxon jurisprudence. But this mode of

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individual redress colored all English legal procedure and colors ours to-day—including our ideas of what a prosecutor is or should be like, if he runs true to type.

There was so much that was unsatisfactory about this prize ring "justice" that it was gradually abandoned. One reason was that a rich man might corner the entire supply of fighting men and leave his poorer opponent without any champion whatever, which in effect is a practice sometimes resorted to by wealthy litigants even to-day.

Another method of trial in criminal cases fully recognized by English law long after the organization of the "assize" (or jury) was by the so-called "ordeal." This was either by fire or water. "Those who were tried by the former," says Bouvier, "passed barefooted and blindfolded over nine hot glowing ploughshares, or were to carry burning irons in their hands, and according as they escaped or not they were acquitted or condemned. The water ordeal was performed either in hot or cold water. In cold water the parties suspected were adjudged innocent if their bodies were not borne up by the water contrary to the course of nature; and if after putting their bare arms or legs into scalding water they came out unhurt they were taken to be innocent of the crime." The theory was that God would suspend the ordinary laws of nature in favor of the innocent. In other words, if the barons or knights assembled in "assize" decided that there was enough evidence to warrant putting a man on trial for crime, both the

law of nature and the law of reason, operating naturally and reasonably, inclined toward conviction.

The presumption therefore was that a man formally accused of crime was guilty—not that he was innocent. Indeed, as late as the fourteenth century the idea seemed to be that unless there were a few men on the jury who had already formed a provisional opinion as to the defendant's guilt the prosecution would not have a fair chance; and in Willoughby's case in 1340 the judge (Parning) somewhat naïvely remarked: "In such case the inquest should be taken by the indictors (the accusers) and others. Certainly if the indictors be not there it is not well for the king." Since out of the "assize" grew not only the grand jury but the trial, or petit, jury as well, and since the prosecutor represents the public, who are the real accusers through these representative bodies, historically at least, there is some reason for the popular impression that the proper function of the prosecutor who directs the great machinery of the criminal law and procedure is to see that persons properly accused of crime are convicted. That is what he is there for, and what he is paid for, and if he makes political capital out of his emotions, or indulges in the luxury of an ostentatious mercy at the expense of the taxpayers, he is no good and ought to be thrown out. Mercy is no part of his job. His function, once an indictment has been found on adequate evidence, is to present the case with all his vigor and to act as the accuser's (the people's) representative.

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After the defendant has been found guilty it is the judge's business and nobody's else to take the responsibility of deciding what shall be done with him. To this extent, therefore, the popular conception of a prosecutor as a "hard" man is not only sound but as it should be. Once in court he is in truth a gladiator, a "champion"—engaged in a struggle to prove the defendant's guilt with another gladiator, who is seeking to establish his innocence. He has no more right to "let up" on a defendant than a lawyer has in a civil case to "confess judgment," or to yield up his client's money under an impulse of generosity; no more right to conclude that the prisoner ought to be given another chance than had the judge, in a recent case chronicled in the daily press, to discharge the prisoner brought before him for theft on the ground that the latter had been stealing for his wife, who was confined in a hospital. This misguided member of the judiciary failed to distinguish between mercy and duty, or to perceive that neither was inconsistent with the other. Instead of conniving at theft, as he practically did, he should have found the thief guilty, instructed him as to the best means of securing relief from the proper sources, and suspended sentence. But no! The temptation to disply to an admiring public the largeness of his heart was too great to be resisted, and he preferred the plaudits of the hangers-on to the purity of his judicial ermine.

Yet it is owing to such fundamental misconceptions as to the functions of prosecution that so

many district attorneys "go bad." The power of a prosecutor, particularly in a large city, is so vast that unconsciously he all too often comes to regard himself as a sort of alcalde, who dispenses justice as a favor and not as a right belonging to the citizen who demands it. He takes it upon himself to decide what ought to be done in every case; and if he concludes that the complaining witness is a mean sort of fellow he kicks him (and very likely a perfectly good case) out of his office. This may not work much harm in certain instances; the fatal error lies in the fact that in so doing he has abandoned the real and only test, which should be applied in every case—namely, that of whether the complainant who has come to him for relief has suffered a violation of his rights. Once a prosecutor gets inoculated with the virus of arbitrary power he becomes the tool of rascals, of politicians, and of his own ambitions alike. The moment he allows himself to be swayed by any consideration whatever—personal, political, social, or financial—other than that of enforcing the law strictly in such cases as come to his notice—from that moment he is a menace to the community, far more dangerous than any "Red," whose only hope lies in demonstrating that constitutional government is but a cloak for tyranny.

Probably there are no public officers in Christendom wielding an immediate authority over a greater number of human beings than the public prosecutors of New York, Chicago, San Francisco, St. Louis,

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and Philadelphia. To at least half of the city's inhabitants, and often to many more, the district attorney represents the final appeal for justice. Theoretically it is possible for any citizen who has been wronged to "get his rights" by applying to the nearest magistrate. But in point of fact, unless he has the co-operation of the district attorney, here and later, he can accomplish little. The prosecutor generally has a representative in every police court, whose business it is to press criminal charges when the complainant has no attorney, but it is clear that if he does so without enthusiasm the magistrate is not likely to "hold" the accused for trial, particularly as he knows the district attorney can "kill" the case later on, either by delaying its presentation to the grand jury, damning it with faint praise before that highly amenable body (of which he is the legally constituted adviser), or by frankly asking the trial judge to dismiss the indictment, if in fact it happens to have been found.

If, on the other hand, the ordinary citizen applies directly to the district attorney's office, he is at the mercy of the assistant in charge or to whom he may be referred. If the assistant, or deputy, doesn't like the man's looks he can throw out the case, and Mr. Ordinary Citizen has no redress, except to try through some occult "influence" to get the decision overruled.

Toward the end of the last century, when the New York district attorney's office at times somewhat resembled a home for aged, infirm, and jobless

men, the treatment of any individual complainant depended largely on from whom he came. The introduction was in substance inevitably the same:

"This is Mr. Assmanshausen. He's a friend of Mike Grady's. Paddy Dolan sent him down here. Look out for him. Mr. Assmanshausen, shake hands with the district attorney!"

It is obvious that if the deputy did not agree that Mr. Assmanshausen "had a case" he would for all time alienate both the affections and political support of (1) Mr. Grady, (2) Mr. Dolan, (3) the gentleman making the actual verbal introduction, and (4) Mr. Assmanshausen himself. Rather than take a chance of so doing he would frequently decide, irrespective of the weight of the evidence, that there was "a case," and so inform the indictment clerk, who would "shoot it in" to the grand jury, with the result that an indictment would follow. The defendant would thereupon be arrested upon a bench warrant, be cast into the Tombs, and languish there until tried or, if fortunate, bailed out. Having started the ball rolling as a supposed favor to Mr. Grady, to Mr. Dolan, or to Mr. Assmanshausen, it now became necessary, in order to retain their regard, for the assistant to keep it rolling. It would not do to let any one of them suppose that the evidence was insufficient, since that would argue legal incompetency in the first instance or that proper enthusiasm was lacking later. On the contrary, Mr. Assmanhausen had to be slapped on the back and filled with encouragement lest he should complain

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to somebody higher up. The deputy was committed to the case, yet the case was no good! The first false step, taken out of a mistaken geniality, now came of necessity to involve a dozen others, at a large cost to the county and to Mr. Assmanshausen, of both time and money. Cases would come up on the trial calendar as many as twenty times, with the complainant and his witnesses sitting expectantly in court, when the trial assistant knew he wouldn't try the case, couldn't try it, and had no thought of trying it. And all just to please Mr. Grady, Mr. Dolan, and the unfortunate Mr. Assmanshausen himself! Of course, in time—after a year or so—the complainant died or got tired out, or his witnesses moved to New Jersey—and the indictment was dismissed on the application of the very man who had asked the grand jury to find it. Good old days, those!

Hanging on the wall in front of me as I write is an indictment that came up for trial twenty-eight separate times, the last one *eight years* after the offense. I keep it as a curio—*People vs. Oscar Daly*, for arson! I am told that in certain regimes they used to bring the indictments into court in bushel baskets and dismiss them wholesale. Nothing else to do with them! They had served to please somebody—perhaps an apocryphal Mr. Grady or an imaginary Mr. Dolan! But how about poor old Assmanshausen?

Good old days! They all wore tall hats and frock coats, and smoked big black cigars, and everybody

was Somebody's half brother or second cousin once removed, or had married Somebody's step-sister; and all the regular ones gave up 10 per cent of their salaries to the "organization." Inertia—the inertia of conscious incompetence and the fear of "getting in wrong"—hung over the office like a pall, numbing all initiative; and there was a great deal of talk about graft. In fact—although it probably was intended as a joke—the first indictment handed to me for "investigation" carried with it the whispered suggestion that there was a thousand dollars coming to anybody who would "recommend it for dismissal"! I investigated, found it was an "Assmanshausen," got it dismissed—but I never heard any more of that thousand dollars. In fact, I never saw real money but once, and that was when a complainant, who wasn't related to anybody in particular and yet whose case I had handled to his satisfaction, followed me to my office, fumbled awkwardly in his pocket, and, finally producing a dingy quarter, told me to "go and buy yourself half a dozen good cigars." I only wish I had taken it! I might have worn it on my watch chain as Whistler did Ruskin's sixpence.

Once again did I come in contact with corruption. Another complainant murmured something to the effect that I would find a "little envelope on my desk." But I was prideful in those days, and told him to go where he properly belonged and has probably long since gone.

Twenty-five years ago the opportunities for a

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young man of moderate intelligence who was not suffering from dipsomania, senile dementia, arteriosclerosis—from insomnia on the one hand, or sleeping sickness upon the other—were enormous. The merest tyro of a deputy at the foot of the payroll could, by relieving some infirm or incompetent trial assistant of all responsibility in an important case, secure the chance to try it himself while his elder slumbered at a nearby table or made up his “expense account” in his private office up-stairs. The preparation of these “expense accounts” occupied a substantial amount of time. Anybody who was anybody had a “county detective” or “process server” specially assigned to be his body servant, who carried his bags, books, and papers, ran his errands, bought his theatre tickets, stood guard outside his door, and bore messages to his fellows—for the telephone in those days was a luxury enjoyed only by good fortune, and they wore their tall hats and burnsidies with a real air. But there was a jovial Hibernian warmth of heart among these favorites of political “big fellows.”

§ 2

I do not for an instant believe that any New York prosecutors in chief have been susceptible to the influence of hard cash in matters of public duty. One, or possibly two, within living memory, although not in this century, may have borrowed rather freely from their assistants who disliked to be unobliging, and some of the notes given in ex-

change may still remain outstanding, but, after all, it was a family affair and the assistant doubtless "owed his salary," as they used to say, to the favor of the borrower. I take no stock whatever in stories of jury-fixing; and I am confident that our judges are above suspicion. But it is easy to see what a demoralizing effect the mere suspicion that the district attorney was conducting his office for the benefit of his friends or political supporters would have upon those whose business properly brought them there. Yet so insidious is the effect of power that it is difficult for a young assistant to avoid adopting an attitude of absolutism toward the applicants for justice who line the benches outside his door and crowd about his desk—all the more so owing to the inherited idea on the part of most of them that justice is something to be bought. This is so ingrained that I used to have great difficulty in refusing the presents brought openly to my office, or surreptitiously to my home, by grateful complainants to whose enemies I had succeeded in having administered the Occidental equivalent to the Oriental bastinado or bamboo cage. If I refused a Kurdistan carpet or a Manchurian shawl the giver's face would instantly register the conviction that I had sold out to the other side. One Syrian "bishop" brought an entire van load of objects of art to the house, and I had a hard time to get rid of him. There was a shabby Spanish grandee who tried to force an ivory inlaid guitar upon me. Tom Lee, the "Mayor" of Chinatown, kept the entire office force

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supplied with death-dealing cigars and their stomachs lined with shark's fin salad. And there was a really beautiful young woman who threw her arms about my neck and held me in a close embrace out of gratitude for my having sent her husband to the penitentiary. I have no doubt that similar incidents occur even to-day in most cities with a foreign-born population.

A prosecutor can hardly be blamed for feeling that he is a sort of All Highest when he is surrounded, on the one hand, by ignorant suppliants for his grace, who regard him as a Little Father, by sycophantic subordinates, cheap politicians, and court officers, who tell him that he is the greatest little man on earth, by bootlicking shyster lawyers and his own hired process servers and lictors, and, on the other—and by no means the less dangerous—by the many distinguished members of the bar, influential business men and bankers, holders of high public office and women of social prominence, who find his career romantic and interesting, who listen eagerly to his narratives of crime and criminals, and all of whom are glad to be on friendly terms with one who may at any moment prove highly useful.

The very fact that comparatively few people come into contact with the criminal law and that most lawyers avoid the practice of it surrounds the district attorney with an atmosphere of mystery. His word "goes" much further than that of somebody whose statements can be more easily checked up. He can

blast and blight an enemy by a skilful innuendo, or he can put him in a totally unfair and prejudicial position from which no explanation, however sound or truthful, can for the time being extricate him. His words in court are, to a large extent, privileged. If he wants to "pigeonhole" or "smear" a case he can do so in such a way that no one can prove it; and he can obscure the true nature of any official act with such a smoke screen of technicalities that few dare even criticise it.

In a word, his office is the most valuable political asset in the community for his party or for himself, for he can annihilate his enemies and exalt his friends, disclose or conceal abuses as may be most expedient, and pose as a champion of the people and an enemy of the politicians even when in a "receptive" state of mind or in actual negotiation with the bosses.

It is much harder for a country prosecutor, or the district attorney of a small city, who very likely has a personal acquaintance with the defendant or his family, to withstand pressure to drop a case or "go easy" than for his metropolitan brother, who, save for the unseen conduits holding the political wires, is apt to be a stranger to all parties concerned. From such experience as I have had I should be inclined to believe that the administration of justice was conducted on a far higher plane in the city than in the rural districts—certainly in New York.

But how is a prosecutor, who sincerely wishes to be impartial, to avoid being made use of? Sup-

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pose not long before an election his boss sends an emissary to him with concrete evidence tending to establish a technical or even a substantial criminal offense on the part of an influential office-holder of the opposite party? If he is satisfied that a crime has in fact been committed it is his duty to act; yet the motive animating those behind the prosecution cannot be misinterpreted. What is he to do? In some cases the attack takes the form of a request for an "investigation" or "John Doe inquiry" into the conduct of a city department or public office, in the hope of starting a scandal or landing some politician. This, of course, he can properly refuse, and should. As everybody knows, these "investigating" grand juries are apt to become great nuisances, the only result of their deliberations often being to subject the taxpayers to large bills for the services of expensive experts and counsel. Sometimes, although not often, they really accomplish something.

Some years ago, a hullabaloo having been raised on the eve of an election over the conditions prevailing in certain parts of Manhattan, it was proposed by certain astute leaders of the political organization responsible for the city government to institute one of these grand jury inquiries for "whitewashing" purposes. It was pointed out that, the life of the grand jury being but a single term, or roughly thirty days, it would be impossible for it in such a short space of time to get any real evidence. The inquiry would serve to quiet public clamor and the jury,

after going through the usual motions, would adjourn with some sort of a "presentment," assuring the confiding citizenry that all was well and urging them to be of good cheer. A man of prominence was hand-picked in advance as foreman and in spite of his objections was pitchforked into the job. So far all had gone as per schedule. Unfortunately for those in charge of the arrangements, the man in question, having once put his hand to the plow, declined to turn back, and the jury, refusing to be discharged against its will, constituted itself a permanent body and unearthed such a mass of evidence as not only to prevent any "whitewashing" whatever but, on the contrary, to put the politicians badly by the ears.

There is no office, not even that of the governor of the State, or of mayor, that so lends itself to self-aggrandizement and of self-advertising as that of district attorney. It can be made a stepping-stone to almost any other and higher place. It can be a continuous performance far more thrilling than any detective story, melodrama, or feature film, and the public can be readily educated up to the point when it demands a new reel every day. A fierce light beats upon the district attorney's office. The successful, or sometimes even the unsuccessful, prosecution of a *cause célèbre* will make its incumbent famous from one seaboard to the other.

The reputation that comes from the performance of a duty well or bravely done is the just reward of any office-holder. But the temptation to concen-

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trate all one's attention upon the finding and exploitation of sensational cases may be very great—particularly if the prosecutor is himself a skilful trial attorney and expects in person to hear the applause of the multitude and to feel the laurel upon his own brow. His gravitation toward this *descensus Averni* is facilitated by the ambition of the police and the eagerness of the press for startling news. Now, a district attorney who prosecutes in person even only the most important trials, provided he gives the time to preparation that such prosecutions require, has little time left for anything else. Can he be much blamed for delegating the detail work of his office to others in order that a notorious murder shall not go unpunished and the majesty of the law made a laughing stock?

The district attorney who is seeking fame rather than that inner consciousness of a duty well performed which is said to be a rainbow to the heart, is apt to be the kind of a district attorney who likes to start something for the advertising that there is in it or to oblige his editorial, social, or political friends whether he can finish it or not. Toward the end of his term of office, provided he be a candidate for re-election, there is likely to be a great flurry of activity. The papers teem with stories of vice trusts and conspiracies to impede the administration of the laws; the big bosses acquire a sudden consuming thirst for spring water and absent themselves from their customary haunts; the dock commissioner, the fire commissioner, and all the other commissioners

tremble in their swivel chairs; even the mayor's countenance is all sicklied o'er with a pale cast of thought; the grand jury is in secret session, and its members wear an air of mystery; our local Saint George, our Galahad, our Launcelot, is getting busy! Stand from under! Very often there are indictments; frequently not. Generally the voice that follows after the wind, the earthquake, and the fire is a very small and still voice indeed. Perhaps it is not the Lord's voice at all, but only a ventriloquist's! Even if there is an indictment the victim is usually some sparrow rather than the elephant at which the political hunter's blunderbuss was aimed. And if the elephant is in fact indicted the chances are that he will be let go again. Indeed, it is to be suspected that a mere indictment no longer carries with it the proper stigma of guilt and that political defendants, at any rate, are actually—as well as theoretically—presumed innocent until the contrary is proved. Almost any newly elected district attorney inherits a large crop of “lemons” (most of them “Assmanshausens,” as above described) from his predecessor.

Even if he is politically 100 per cent pure, a prosecutor cannot help having something put over on him once in a while! Even the wisest and best make mistakes, and there are always Judases and jackasses among the half hundred assistants who play him false or play him foolish.

By the end of his official term there have inevitably accumulated from natural if not from artificial or other causes several quintals of indictments im-

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possible to try and equally inconvenient to dismiss. You can always tell one of these at any distance, owing to its colorado wrapper and swollen filler. Dozens of deputies have weighed the same witnesses in the same legal balances and found them wanting. Each has committed his findings neatly to foolscap and signed his name thereto, recommending that the case be cast out into the drought. Yet no one, not even the district attorney himself, has had the nerve to do it for fear of the gnashing of teeth that will inevitably follow such a course. So the dusty bundle is sent back to the chief clerk's office, to be carried over as "undisposed of" to the account of the next incumbent. "Let George do it!" is a favorite motto in the criminal courts building of every large city.

If a district attorney has been playing politics and has found indictments for mere effect, without any intention of trying them, based on outlandish and forgotten statutes, or distorted applications of familiar ones, or "on general principles" in lieu of proper legal evidence, he usually does nothing about them until after the election in which his own fate is determined. If he loses, he doesn't care what happens to them. His opponent will dismiss them fast enough. If he wins—well, he has won, hasn't he? Some day he will slip into court when the press boys are across the street and "recommend" that the wretched bugbears be dismissed. It is curious how rarely these legal chickens—in the shape of unjustified indictments—come home to roost. They can

almost always be “shooed” away. There is generally just enough that is malodorous about the subject-matter of the charge to cause the accused, however unfairly treated, to prefer silence to publicity—to be glad to have the whole thing hushed up rather than to demand a trial.

And then, oh, then! there are the “tough nuts,” the hard technical cases that nobody wants to handle because they will take so long to try—weeks often, involve looking up a lot of law, bring no prestige or *kudos* in the winning, yet much odium and re-creation if lost. These are the “commercial” cases, arising out of fraudulent bankruptcies, obtaining money or goods by false pretenses or by means of dishonest representations as to credit. Nobody loves them, nobody wants to be the goat, so everybody finds reasons why they should not be tried, and once such indictments are found, they linger on unheralded and unsung, a fruitful source of annoyance to the next “D. A.” who enters office—usually on a wave of enthusiasm born of his promises that he is going to get after the “big fellows” and intends to stamp out commercial and financial dishonesty.

There is no space here to catalogue all the varieties of these abandoned derelicts, drifting aimlessly in the doldrums of disinclination or becalmed on the Sargasso Sea of official neglect. But they are the bane of every district attorney. He will have enough changelings of his own, without taking to his bosom the bastards of his predecessor. So the

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first thing the newly elected "D. A." does is to assemble in a huge pile all these illegitimate children of crime and distribute them around the office with instructions to "investigate and recommend for dismissal all cases that should not be tried." Out they go! "George" does it! And "George" says most emphatically that it isn't his fault, and that those indictments never ought to have been found in the first place—which saying is apt to be true.

From the foregoing it may be inferred that there is a wide choice in the selection of cases to be tried. If the "D. A." is a would-be orator, or fancies himself as a trial advocate, or is looking for publicity for political reasons, he takes the pick of the lot himself. If he isn't, the question of who is to prosecute the "star" cases is often a fertile source of jealousy and ill feeling among his subordinates. Fortunate the "D. A." who has on his staff one trial assistant so preeminently able that as a matter of course he takes, whenever necessary, the chief prosecutor's place as the advocate of the people. In ancient days rival assistants would resort to every sort of huggermuggery to get possession and control of cases likely to attract public attention. One excellent method was somehow to work one's way into a case in the beginning and stay there, refusing to surrender one's prior rights, even to an older and perhaps better man; another was to invoke a gentle diplomacy which might induce the right person to "ask" that a particular assistant should be "assigned" to try the case. It is no small task for the

"D. A." to keep peace in his official family, and it requires skill to keep all the official noses properly in joint. There have been occasions when assistants who had quarreled over some case never spoke to one another again. Losing the chance of one's young life to "make a big reputation" comes very hard. Yet, looking back twenty-odd years, it does not seem as if the reputations won in the criminal courts often lead to high forensic triumph in other tribunals.

The district attorney who does not hew close to the line of single-minded duty lays up unending trouble for himself. He is lost and forever damned if he regards his office as a mere opportunity by which to rise to higher things, either on the stepping-stones of his own dead self or of some unfortunate accused of crime. This is why so many favorite sons who have had enthusiastic support at the beginning of their terms of office have failed in the end to satisfy the requirements of a shrewd and discerning public.

A newly elected district attorney has everything his own way; he is (officially at least) on the side of the angels; we know that he has at best a hard row to hoe and that a man cannot be in twenty places at once, and if he speak us fair we naturally give him the benefit of any doubt and wish him god-speed. Yet there is sometimes a danger of his utilizing the very magnitude and multiplicity of his duties as an excuse for doing little or nothing. Many years ago the fact that the district attorney was himself engaged in the trial of important cases rendered it

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necessary to create the unofficial office of "Acting District Attorney" in order that some one of his assistants might perform in his temporary absence those less conspicuous duties which in the aggregate really constitute the bulk of his public service.

As time went on, the "acting" district attorney up-stairs seems occasionally to have rendered the district attorney "acting" down-stairs immune from the ordinary labors of his office, even when he was neither down-stairs nor acting. The ancient Aztecs are said to have so ordered their judicial arrangements that their judges sat in a great room where all who called to converse or consult with them might be seen. Thus also it could be observed where they were themselves as well. Sometimes it is hard to find out whether a district attorney is up-town, down-town, actually behind his mysteriously closed oak door, or (with Mr. Jones or Mr. Smith "acting" as a stalking horse in the office opposite) has "beaten it" to French Lick, Palm Beach, or Saratoga.

§ 3

It is easy to grumble. Yet the office of district attorney has so vital an influence upon the respect in which our institutions are held that we have a right to hold those who occupy it to a high standard of industry, sobriety, and self-restraint. The district attorney does not need to be a great lawyer. One capable law clerk can furnish most of the "dope" for a staff of assistants who rarely open a book—

even the Penal Code. Ninety per cent of the actual work of the office is the exercise of mere common sense. The majority of cases practically "try themselves." The complainant tells his story in more or less his own way, the defendant denies it or "stands pat." The judge charges the jury. They usually convict. There is no real legal or trial ability required. And it goes on, day in, day out—the mills of the courts grinding out convictions with few acquittals, the year round.

The idea that criminal law is peculiarly difficult or complex is unfounded. There have, it is true, been many hair-splitting refinements made by the bench, particularly in the old days when the penalties were so terrible that even judges sought to mitigate the atrocity of the law by giving the defendant another chance when they could. But in our criminal courts to-day the contest is usually one of *fact*, not of law. The cases are of the "knock down and drag out" variety. Courtesy, courage, broadmindedness, and scrupulous integrity are needed rather than legal ratiocination. It is merely a question of bringing out the evidence, and it is not inconceivable that a substantial percentage of criminal proceedings would be facilitated if the district attorney did not appear at all. One often writhes with mental agony when forced to listen to some youthful deputy blundering well-meaningly through a case, interrupting with unnecessary questions just as the witness gets well started on his story, and fighting to exclude evidence that is either inconsequential or in fact beneficial to

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the people's case. Most criminal prosecutions—I mean the ordinary cut-and-dried police cases—are little more than matters of form. Crank the machine and it goes along of itself. If the district attorney isn't at hand to ask the witness "Well, and what happened next?" the judge does it for him.

As a matter of fact, the assistant district attorney who, for nearly a generation, was as much a fixture in "Part One" as the jury box itself, was afflicted with a physical ailment that made it almost impossible for him to keep awake except when actually on his feet. He would question a witness and, having done so, sit down while the defense was cross-examining and peacefully doze off until it was time to call the next. Sometimes he would wake up and sometimes wouldn't. But things went along quite all right just the same, and because the jury perceived that he had no personal axe to grind and was a good-natured person of generous impulses, they usually found the defendant guilty. Indeed, as I recollect it, the percentage of convictions to cases "tried" by this assistant was the highest in the entire office, yet from a theoretical point of view he was a very bad prosecutor indeed, since a large part of the time he was sojourning in the land of dreams.

About three-quarters of all cases are disposed of, not by actual trial, but by pleas of guilty, by direction of the court, or by "recommendation" of the district attorney, who makes written application on the back of the indictment either that the defendant's bail be discharged or that the indictment itself

be dismissed. The usual grounds upon which such recommendations are based are that the people's witnesses have disappeared or moved out of the jurisdiction, that vital evidence is lacking, that, the case having been tried once already, the jury were almost unanimous for acquittal, or that examination shows that a reasonable doubt as to the defendant's guilt clearly exists on the evidence and that for this reason the case should not be submitted to the jury—in other words, that it is an "Assmanshausen." A careful study of the written recommendations upon the backs of the indictments on file in the record office of the district attorney would probably indicate what proportion of indictments filed during the terms of the respective incumbents should never have been found at all. Of course this inference would not be quite as strong where District Attorney B recommends the dismissal of indictments found by District Attorney A, but where B recommends the dismissal of those found by himself, the query is pertinent as to why he should have submitted the matter to the grand jury in the first instance if he was eventually to change his mind about prosecuting the offense.

There is a natural tendency for the district attorney to substitute himself for the jury and if he thinks that the indictment should not have been found or even that he cannot convict, to ask for a dismissal, or if the case appeals to him, to strain the ethics of his office to secure a verdict of guilty. A prosecutor, knowing that his intentions are honora-

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ble, may quite unconsciously usurp most of the functions of the entire court, become an autocrat, and leave others little or nothing to do. If the judge allows this, the district attorney is apt to become blinded by his own importance and feel that whatever he may do is justifiable, because he is on the right side. Thus, he may use the authority of his official position improperly to influence the jury or employ methods to trick or embarrass the defense which do him little credit and tend to reflect upon his office and the whole administration of criminal justice.

The temptation to play fast and loose with a crook who has taken the stand in his own defense or who has had some dullard of the criminal bar assigned to protect him, to fight fire with fire, and to beat the shyster at his own game, is often enough to make a young deputy district attorney forget that to preserve the standard of official conduct is more important than to send a burglar to jail. The outrages sometimes committed by youthful (and other) prosecutors in an enthusiastic desire to see that no guilty man shall escape have doubtless caused many a chuckle to Judge Jeffreys and Torquemada on the further side of the Styx. For the "D. A." can do in court with comparative immunity things which in a defendant's counsel would bring the judge down upon him like a ton of bricks. If he is caught offending it is easy for him to explain that he simply "forgot" or was "honestly mistaken."

Certainly the young assistant district attorney

has every advantage, not the least among them being that he can speak his own language and so convey his ideas to the jury—something not always the case with his opponent. And, then, do not the jury already know that the defendant is guilty, because this innocent looking youth, whom the court addresses as “Mr. District Attorney,” has told them so? Of course, they do! And they know if they don’t convict when they ought the judge will probably read them the riot act and hold them up to public contumely. They are also aware that the grand jury has indicted the defendant, and that presumably he was caught by the police “with the goods” in the first place. The judge can talk until he is black in the face about “presumption of innocence” and “reasonable doubt,” but they will take it all in a Pickwickian sense. They continue to be reasonable men even after becoming jurors. They cannot seriously imagine that after the evidence has been sifted from three to six times by different judicial and semi-judicial officials the chances are anything but overwhelmingly against the defendant’s innocence.

In the general run of cases, with the ordinary metropolitan jury, the tide is running rapidly against the defendant from the moment he appears at the bar. All the “D. A.” has to do is to stand on the bank and see him drawn over the rapids. So great is the prosecutor’s influence with most members of a jury panel, who after several weeks of service have come to trust and respect him, that not infrequently

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the mere expression on his face is enough to lead them to convict. The district attorney and the jury come to feel that they are a sort of "happy family," whose mutual confidence and esteem engenders a sense of "team play," leaving the stranger defendant at a hopeless disadvantage.

All the more, under these circumstances, does good sportsmanship demand that, no matter what tactics the defense pursues, the prosecutor must keep his own armor unsullied and play absolutely fair. Frequently this is hard work. When some artificial rule excludes a piece of vital and conclusive hearsay evidence—that the defendant was seen immediately after the homicide carrying a smoking pistol, for example—it may well seem at the moment justifiable to get the fact before the jury by hook or by crook. And there are a thousand ways of doing this; in the opening address, which the court says is "not evidence," but which the jury is apt either to accept in lieu of it or to confuse with it; by innuendo in the asking of questions "proper" or "improper"; through the mouth of an impulsive but disingenuous "cop" who just can't help blurting it forth, although it be immediately "stricken out" by the judge; or, if the devil has been busy, by simply saying it yourself so that the jury can hear you.

But there are even more subtle ways to carve the entrails of a defendant, particularly if he takes the stand as a witness in his own behalf. One of these is by questioning him as to his "record." You may ask him almost anything you like. Anyhow,

you are permitted under the guise of "testing his credibility" to accuse him of every crime on the calendar merely by having him deny each one of them *seriatim*. You are "bound by these answers," of course. That is just another of the law's little ironies. For if you look and talk like a gentleman the jury assume that you wouldn't have asked the question if the charge were not true. Whatever he says, they believe he did it. His "No" is worth nothing against your presumptive honesty. Thus, if you ask a defendant questions which are *not* based on known and provable fact you may be in effect bearing false witness against him in a most dastardly way.

Nine times out of ten—perhaps ninety-nine times out of a hundred—no harm results, but the hundredth time somebody is knifed in the back, that unfair and unjust question is what turns the scale in the jury's mind against him. They are probably going to think him a good deal worse than he really is, anyway. Do not increase the presumption, heavy enough against him already, by smearing him with mud that is not his.

When all is said and done, unless the young prosecutor sets an example of just dealing, high integrity and sincerity, his years of service—his best years—will be thrown away. For in that example—the good deed shining "in a naughty world"—amid the sordid surroundings of crime and poverty, of coarse brutality and cynicism—lies his greatest opportunity for public service. At first he is exhilarated by the

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consciousness of his own supposed intellectual and social superiority. Court officers, policemen, detectives, and office hirelings pat him on the back, flatter him, and try to induce him to believe that he is the cleverest trial lawyer, the most astute prosecutor, the most eloquent orator of the decade. He is in fact a big fish in a pool of not inconsiderable size. He dreams of a political career, or, at the least, of an office crowded with wealthy and influential clients drawn there by his reputation as a prosecutor. He is blinded by blarney, stultified by sycophancy. He eagerly searches the columns of the papers for his name and feeds out "stories" to the boys in the pressroom. He really believes that because he is a more or less important figure in the tiny world of turnkeys, cops, and cheap politicians he counts for something in the world outside.

But some day his little strutting universe receives a jar. He discovers that his supposed reputation is no reputation at all—other than that he is, or has been, "in the district attorney's office" like so many other young men; that nobody save the people actually interested in them paid any attention to or even ever heard of his "star cases," and that among his social equals he is regarded as a cross between a truant officer and a headquarters detective. He perceives that the praise heaped so unstintedly upon him is but the lip service of time-servers who have seen in him, or his influence, a chance to secure "a raise" or a better job. When that day comes and he realizes that he has been

living in a queer tucked off corner, devoting himself to much that really has little connection with the practice of his profession, and really offers more of advantage to the novelist than to the lawyer, in a circle whose standard of refinement is that of a Harlem River park, and whose ideal of social life is a Coney Island picnic given by an East Side benevolent association—when, in a word, he sees his job as really it is, and his burst bubble of pride turns in his hands to Dead Sea fruit—then, if he has not the satisfaction of knowing that he has lived up to his own standard of what a gentleman should be, his time has been worse than lost.

The district attorney has a variety of duties connected with the administration of justice of most of which the public is unaware, or at any rate unmindful. Besides being the grand jury's adviser, he is obliged to report in writing to the governor on all cases in which applications for pardon have been made, looks after extradition matters, is charged with passing on the financial responsibility of bondsmen, and has to take part in the inquiries conducted into the sanity of defendants before and after conviction. Most of these things are done for him by trained and qualified assistants.

His chief task, however, is to hear and determine the merits of the complaints made to him by aggrieved citizens.

If these are of the routine variety the complainants are relegated to the magistrates' courts and are looked after by the deputies. If they are unusual,

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either in the importance of the offense to the community, the standing or influence of the accused, or in the fact that the offense is one outside the scope of the criminal law as commonly construed or applied, the district attorney goes over the matter himself in the first instance, then refers it to an assistant for further examination, and finally decides what is to be done in conference with the latter.

But he cannot simply sit in his office and wait for complaints to be brought to him there; he must act, no matter in what way the knowledge of crime be brought to his attention. If a building falls or a subway caves in or a gas tank blows up he must take steps to locate the responsibility for criminal negligence, if any there has been. There are over 200 felonies and over 400 misdemeanors on the New York statute books, offenses against which he is charged with prosecuting. There are an unlimited number of possible conspiracies to commit acts "injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws." There are, in fact, so many statutes and ordinances that there is hardly anybody who does not violate some one of them every day of his life.

There are laws governing the conduct of places of public amusement, factory labor, Sunday observance, fancy dress balls, ice-cutting, funerals, every conceivable trade and occupation, every aspect of

human activity, from pulling teeth to planting oysters, for whose enforcement he may be held responsible.

Law-making has become a national indoor sport, and it is one of the worst things we do. But we do not really intend that the laws shall be enforced. We hire a man to enforce them, but we expect him to use a wide discretion about how he does it, and if we do not like what he does we are annoyed and feel that he is taking advantage of us.

Added to the multiplicity of criminal statutes is the fact that human nature is not only fallible but that a large percentage of political office-holders and their hired subordinates are morons. No one can administer an office with a hundred employees without all sorts of mistakes being made without his knowledge, for which he technically is responsible and for which the district attorney might with some color of propriety initiate a prosecution.

There is no public office so well run that some basis of fact could not be found apparently to justify an official investigation, even including that of the district attorney himself, who usually does the investigating. There are abuses in high office and low; bribery and corruption in officialdom and in business; and sharp practice everywhere. Probably there will be for a long time to come. Besides, there are thousands of acts which in their nature are morally just as reprehensible as those which the law stigmatizes as crimes but which are outside the statutes.

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Crimes are those acts only which have been regarded by our lawmakers as sufficiently dangerous or harmful to society to be forbidden under penalty. An act may be highly immoral or wrong, may, in fact, be a grievous sin, and yet not a crime. A misdemeanor may be much more heinous than a felony. Crimes are not crimes merely because they are wrong, but because the State has enjoined them. You can allow a baby to be run over by a motor when you could have saved it by stretching out your hand, and be guilty of no crime whatever; or you can let your neighbor die in agony without telephoning for a doctor or going to his assistance. You can be the meanest sort of a mean swindler, and yet be beyond the reach of the law, which is highly inadequate to punish commercial or financial fraud. And the poor are forever with us, always being taken advantage of by reason of their inability to protect themselves.

“So I returned and considered all the oppressions that are done under the sun—and beheld the tears of such as were oppressed, and they had no comforter; and on the side of their oppressors there was power; but they had no comforter.”

§ 4

Out of all the multifarious sins and wickednesses that are brought to his notice the district attorney must cull such as are crimes and then decide whether or not to prosecute them. If he bothered himself

with every trifling offense he could doubtless occupy his full time with the horrors of expectoration alone. But the district attorney can no more prosecute all violations of law than can the police arrest all the violators. They do the best they can, marching round and round like the supers in a stage army, to create the impression of numbers, cover all the territory possible, and hit a head when they happen to see one. They have got to stop burglary, arson, and at the same time enforce the traffic regulations and arrest theatre ticket speculators. They can't do it. There are not enough of them to go around.

The district attorney is in the same box. He cannot possibly prosecute all the crimes that are going on under our noses every day. It would take 10,000 district attorneys and as many courts. We should all have to turn ourselves into volunteer policemen—and then arrest ourselves. The result is that the district attorney, apart from those crimes which are brought to his attention by the person directly aggrieved, has to choose which he will prosecute. He can't clean up the whole town. Shall he go after Fifth Avenue or Broadway or Greenwich Village? Investigate the Park Department, Bellevue Hospital, or the mayor? In the end he sits down somewhere, presumably in his office, and waits for trouble. When trouble arrives in the person of "Mr. Assmanshausen," who, introduced by Messrs. Dolan and Grady, tells him that the greatest crime in the history of Wall Street has been or is about to be com-

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mitted in connection with the sale of the second mortgage bonds of the Tittlebat Tidewater Company, he has to fish or cut bait. And either course has its own special misery. For if he finds that somewhere, tucked away in the complicated financing of the Tittlebat Company, there is a genuine, if elusive, cause for criminal action, he may have to spend weeks or months, employ expert accountants, and assign half a dozen or more of his best men to the job of untangling a mass of contracts, guarantees, underwritings, and loans in order to get at it, while other matters are pushed aside and clamorous complainants forced to wait. And even then! After he has found a violation of some statute that will stand the acid test of a demurrer, has caught a legal cat that can be forced to fight—then, alas! he may know full well in his heart of hearts that the affair is too complicated ever to be elucidated to a common jury should indictments be found! Shall he out with it and say so? Shall he frankly admit that the criminal law is unsuited to cope with the iniquities of corporate finance—freely confess his helplessness after the newspapers have with one accord commended his assiduity in the Tittlebat matter? Or shall he go ahead and get his indictments with the secret knowledge that he will never try them, or, if he does, that he will go down to inevitable defeat? In any case, sooner or later, he will be accused of being under Wall Street influence—damned if he does, damned if he doesn't!

He is in an even harder position when he knows or

suspects that the complainant is moved, not by a desire to have the wicked brought to justice, but to depress the market value of the stock of the corporation whose directors he accuses of crime. Just as there are persons who make a good living by threatening to procure injunctions to restrain what they claim to be the *ultra vires* acts of wealthy corporations or to make other sorts of trouble, so there are those who seek to stimulate the criminal authorities to begin proceedings against corporations of whose stock they have gone heavily short.

During the period when the Metropolitan Street Railway system was under fire and an investigation of the transit situation was being conducted, the anxiety of certain prominent financiers as to the probable outcome and what the district attorney might, or might not, do was almost as laughable as it was significant. The flimsiest excuses were utilized by these gentlemen to revamp acquaintanceship with members of the district attorney's staff who might possibly shed some light on what was going to happen; and over a cup of tea or stronger stimulant the most blatant and obvious attempts were made to draw out information from which the probable course of the stock market in street railways might be prognosticated. Whether the lawyer who laid the matter originally before the district attorney was acting from an enlightened sense of public duty or was in the pay of some syndicate of brokers was, if I recall correctly, never clearly demonstrated.

The unsavory character of such a complaint, how-

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ever reluctant the prosecutor may be to co-operate in any stock-jobbing enterprise, cannot limit his activity beyond justifying a refusal to lend his official assistance—certainly to any extent out of the ordinary—until the complaint has been passed upon in regular course by a magistrate. If it be there shown that the directors of the corporation have been violating the law it becomes his business to prosecute them in the regular way. He must present the matter to the grand jury, secure indictments, and do all in his power to bring the alleged criminals to justice. Incidentally, he may be justified in securing another indictment against the complainant and his sponsors for blackmail.

The fundamental defect of the criminal law—a defect which can never be remedied—is that it does not concern itself with immoralities, sins, or even wrongs, but only with a limited number of offenses most of which, if not all, carry with them, at least historically, a connotation of violence.

If you draw a large circle on a piece of paper and put a dot in the centre, with another tiny circle around it, it may suggest the relation borne by what our legislatures have designated as crimes to all those other acts which are equally, if not in certain cases more, despicable and reprehensible in their nature, but which have not been so classified. The dot itself may be taken to stand for such crimes as are discovered and actually punished.

Now a “tort,” that is a private wrong for which the perpetrator may be sued in the civil courts, may

be far more odious than the violation of a criminal statute. A malicious man can be far meaner than a mere burglar, and his meanness more despicable in the sight of God and of man than any crime. No one can possibly explain why the legislature has selected some acts for criminal legislation and overlooked others. A felony may or may not be morally worse than a misdemeanor, and some act, which has never been made a crime, worse than either. It is a crime to walk on the grass and a crime to murder your aunt, but it is not a crime to publicly defame a woman's reputation by word of mouth.

However, it is inconceivable that we should stigmatize as criminal everything of which we disapprove and expect to bring about the millennium by prosecuting everybody who was guilty of violating the Decalogue. Yes, we must recognize that the criminal law *is* arbitrary, crude, clumsy, archaic, and unequal to dealing with the subtler devices of the devil. The man in the street—our worthy “Assmanshausen”—the “sucker” who has been trimmed in the bucket shop, the girl who has been slandered, the poor old woman who has bought oil or mining stock in a corporation which has only hopes for assets—do not know this. They not unnaturally think that because they have been wronged in a manner repugnant to morality, the offender must be subject to criminal prosecution. They cannot be made to understand that if some one has broken one of the Ten Commandments he has not necessarily committed a crime as well. They cannot be blamed, either. There

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is no "justice" in it. It is the mean man that cheats his confiding neighbor who deserves jail rather than the poor devil who knocks down the hooligan who has insulted his mother.

But, arbitrary as is the criminal law in its selection of what shall be called crimes, it is even more so in its operation. Policemen and prosecutors, judges and juries, are not only arbitrary but stupid, ignorant, and subject to influences of various sorts. An inferior table d'hôte has added many a year to the culprit's term who came up for sentence after luncheon. Some judges have a horror of burglary, some are peculiarly antipathetic to bigamy, while a few think a man should be entitled to have as many wives as he can pay for. A judge in one corner of the Criminal Courts Building will be giving a defendant convicted of manslaughter twenty years, while another judge, in a court room diagonally opposite, will be sending a defendant no less guilty to the reformatory. It is not justice. Nobody pretends it is.

The only way to have anything approaching equality is to abolish the criminal law entirely and empower some wise and experienced citizen to send to prison all those who deserve to go there. And there should be no appeal; no criminal definitions or statutes. Anybody could accuse anybody else of anything that he thought deserving of condemnation and the Wise One would hear what each had to say, interrogate their witnesses, and send either or both to jail.

Many of the public have an idea that some system tantamount to this is even now in operation and that such a Wise One already exists in the person of the district attorney, who has only to wave his hand to have the unrighteous swept from the face of the earth. Would that this were so! The failure of criminal justice is due less to the inadequacy of the substantive law of crimes, the ineffectiveness of criminal procedure, or the weakness of human nature, than to the inherent impossibility of arbitrarily differentiating between crime and sin. This cannot and never will be done. And for not accomplishing the impossible the district attorney will always be blamed.

The inequalities of justice, the law's delays, the absurdity, ineffectuality, and cruelty of putting people in jail, the oppressor's wrong and the proud man's contumely have been favorite subjects of rhetoric, poetry, and irony from the time of Solon to that of Bernard Shaw. But I am an optimist. I believe that the criminal law in its present form is a lot better than nothing. I even go further. I regard it as most encouraging that such a slight leaven of successful prosecution should have the salutary effect it does on the lump of humanity.

Yet while the criminal law may be a vain attempt to render the Day of Judgment superfluous, and while it is doubtless susceptible of immeasurable improvement, it would be good enough to muddle along with provided we could get the right sort of prosecutors to administer it. That is the trouble

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with most human institutions—and the criminal law is no exception.

Common sense and honesty, not cleverness and oratorical ability, are the attributes needed in a prosecutor. Yet because of the tradition that the district attorney should be a professional legal prize fighter candidates for that office are often chosen for their demagogic qualities. However, I have never observed that eloquence in a prosecutor added noticeably to his success with the jury. They may enjoy listening to his oratorical fireworks for a limited time, but in these sophisticated days they are apt to regard the speeches of counsel as a necessary evil only and most of the highfalutin as “hot air” and “bull.” Courts of law have lost most of their awe and mystery for the ordinary citizen, largely through his knowledge that even if the judges and prosecutors are honest and able men they generally owe their jobs to politics; and jurors are no longer so ignorant that the mellifluous voice of a silver-tongued orator can deprive them of their powers of reason. They are apt to be governed by the facts—which is a long step in advance over what used to be the case and is so still in some parts of our country even to-day.

What is the test of a successful district attorney? How are the people to know whether the prosecutor is on his job or whether he is better or worse than his predecessor unless the newspapers tell them so? Cannot his industry be estimated and his ability be measured by his results as indicated in the records?

Not very satisfactorily. For the mere number of indictments found by the grand jury under his guidance does not necessarily prove anything as to his personal efficiency. They may indicate greater or less police activity, or an increase or decrease in the amount of crime itself. The volume of indictments has no significance whatever—it may be that none of them should have been found and that all of them will have ultimately to be dismissed, or that there should have been twice as many. Similarly, no comparison between the number of cases “disposed of” by one district attorney, as contrasted with the number handled by another, furnishes any test of effectiveness, for the “disposition” may be merely a wholesale jail delivery by “recommendations of dismissal,” and the so-called “disposition” the very worst disposition possible. In point of fact a paucity, rather than a multiplicity, of indictments may well indicate that the district attorney knows his business and is doing it effectively, *i. e.*, is throwing out the “Assmanshausens” instead of yielding to his own desire to oblige and clogging the calendars with hopeless cases.

Moreover, the fact that the district attorney secures convictions in almost all his prosecutions proves nothing either; it may only tend to show that he is unwilling to find indictments in other than “dead open and shut cases,” that is, cases where there is no possibility of an acquittal. Such a prosecutor is even more dangerous than the amiable begger of “Assmanshausens,” for the police will quickly

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become discouraged if the district attorney insists that no crook shall be put on trial who is not caught with a revolver in his hand or a stolen necklace in his pocket. A hundred per cent batting average in the trial of cases, without any acquittals, or an equal ratio of convictions to the total number of indictments found, would in fact justify the suspicion that the prosecutor was running his office for the sole purpose of self-glorification.

How, then, are the taxpayers to know a "good" district attorney when they see one? The only answer is that they can't. The statistics of his office are practically valueless to help us. If there were something definite to start from—say an average ratio of convictions to indictments, covering a great number of years, taken in conjunction with an average ratio of indictments to the county's population, it might from mere figures be possible to guess at the prosecutor's activity and efficiency. But it would be only a guess, and a bad one at that, for it would necessarily be based on the assumption that police activity and efficiency remained constant throughout the whole period. No; statistics can aid us but little. The only way to determine what sort of a district attorney is in office is to watch his action in cases where the presumptive facts are public property, and where each step in the proceedings is known. Then and then only is it possible to form an opinion as to what influences are guiding his course and whether he and his assistants were appointed because of their integrity, assiduity or

ability rather than on account of their consanguinity to persons of political prestige. Even then he will fool you—if he keeps quiet. About all you can do is to say that he does *not* seek self-advertisement, does *not* appear to be playing politics, seems to be getting about as many convictions as usual, and, so far as can be known, is neither multiplying “Assmanshausens” on the one hand, nor turning out guilty Barabbases upon the other.

The hitherto unenlightened reader may find himself somewhat surprised at the variance between his own preconceptions of the necessary qualifications and official duties of a prosecutor and what has been here set forth. He will certainly conclude that he has underestimated the importance of those functions which the district attorney performs at his desk as contrasted with those in the court room, and he may perhaps realize for the first time the reason why, when at last an indictment is actually moved for trial and the defendant is at the bar, the prosecutor no longer feels obliged to adopt the attitude of a good Samaritan toward the prisoner and his lawyer.

For before that consummation has at last been attained, and the unwilling defendant has been forced to trial, the evidence against him has gone through such a winnowing process that his guilt is not only presumptive but, in the vast majority of cases, absolutely certain. In the first place, he has been arrested under circumstances which satisfy the police, at any rate, of his guilt; the evidence has been heard

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and sifted by a magistrate who has found reasonable cause to believe him guilty; the district attorney, if he has not done so already, now, through the assistant in charge of the grand jury, makes a thorough examination into the merits of the case, and if he has any doubt about it, takes steps to have that body throw it out; the grand jury hear the witnesses and must be reasonably certain that their action is justifiable before they indict, and last, but by no means least, the assistant to whom the case is assigned for trial, goes over it with a fine-tooth comb, and if he believes, not merely that there is any doubt of the defendant's guilt, but that there is any considerable doubt of his own ability to demonstrate it and secure a conviction, he is astute to find any sort of colorable excuse to recommend a dismissal and thus escape the odium of an acquittal.

If there be any one, who, after these various consecutive steps have been taken, thinks that the district attorney should not proceed on the theory that it is his business to prove the defendant guilty by every proper means at his command, he belongs among those who still believe that the proper way to have met the invaders of Belgium would have been to go out unarmed to greet the German hosts, singing songs of welcome, and thus to have covered them with shame. No; there is a point where the district attorney has presumably fulfilled his duty toward the defendant as "one of the public" and when it has become his business to send him up if he honorably can do so.

Some fifteen years ago in "The Prisoner at the Bar," a little book dealing with the administration of criminal justice, I said:

"The district attorney is a quasi-judicial officer, who must be at one and the same time the friend and right arm of the court and the advocate of the public right. His official position gives him an influence with the jury which honor forbids him to abuse, and demands an impartial consideration of the evidence and a dignified method of conducting the case, irrespective of the tactics of the defense. He represents not only the public, but the defendant, who is one of the public. He should be glad to welcome at any stage of the proceedings credible evidence tending to establish the innocence of the accused, and if it convinces him that the defendant is not guilty he should, even in the midst of a trial, arise and move that the jury be discharged and the prisoner set free. But this is by no means inconsistent with a vigorous insistence upon the people's rights, nor does it require that the prosecutor should refrain from using the advocate's customary weapons of attack and defense. While he is cross-examining the witnesses for the defense and arguing to the jury, he is for the time being the lawyer for the people, and the appellate courts have said that it would be manifestly unfair not to extend to him in summing up the case an equal latitude of expression and scope of argument with the counsel for the defendant."

One might suppose after reading the remarks of

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certain reformers and penologists that the community had no rights at all. The constitutional guarantees which protect the liberty of the individual were not intended to deprive the public of an advocate.

III

HUMAN NATURE IN THE COURT ROOM

INTRODUCTORY

Colonel Roosevelt once told me that the following anecdote from "*The Prisoner at the Bar*" was his favorite story.

There used to be an ancient court officer, a loyal son of old Erin and a devout member of the Roman church, whose function it was to interrogate the convicted prisoner and repeat his answers to the clerk for record. On one occasion, a defendant, having been found guilty, was arraigned at the bar for the purpose of having his pedigree taken, and the following conversation ensued:

Flaherty to Defendant: "Say, me friend, where was ye born?"

Defendant to Flaherty: "Lowell, Mass."

Flaherty to Clerk: "'Lowell, Mass.'! he says."

Flaherty to Defendant: "Where do yez hang out?"
(This question referring to the prisoner's "residence.")

Defendant to Flaherty: "Nowhere."

Flaherty to Clerk (in commiserating tone): "Ain't got none."

Flaherty to Defendant: "Phat do yez do fer a livin'?"

Defendant to Flaherty: "Nothin'."

Flaherty to Clerk (less commiseratingly): "Ain't got none."

Flaherty to Defendant: "Are ye married?"

Defendant: "No—thank God!"

Flaherty to Clerk: "He says, 'No, thank God!'"

Flaherty to Defendant (quoting from printed list of questions in his hand): "Did ye ever receive any previous religious instruction?"

Defendant: "How's that?"

Flaherty to Defendant: "Phat's yer religion?"

Defendant: "Don't believe in nothin'."

Flaherty to Clerk (loudly): "Protestant!"

III

HUMAN NATURE IN THE COURT ROOM

FOR fifteen years I served as prosecutor under various district attorneys of New York County, and during that time I made several discoveries about human nature on the witness-stand and in the jury-box. These discoveries often came through rude jolts. For example, early in my career as a prosecutor, having been given a murder case to try, I selected what I considered a splendid jury of intellectual citizens.

Just as I was about to open the case, one of my associates in the office, an old Tammany war-horse, strolled into court and cast his eye over the *intelligentsia* in the box.

"Well, son," he remarked, "you've got a disagreement already!"

Rather resentfully I inquired the reason for his opinion.

"Get on to Number Ten," he whispered. "Never take a feller that has a 'dome' and wears his hair long like that. He thinks he looks like William Jennings Bryan, and he'll fight forever to prove he knows more than all the rest of 'em put together. You'll see."

I did see. At the end of a two-weeks trial, the jury split eleven to one—and that one was the gentleman who thought he looked like Mr. Bryan.

It is quite true that he may have been in the right and that the other eleven were wrong, but from that day I have had an increased respect for the common, garden variety of citizen—at any rate, for the purposes of administering justice.

The power to “size up” a witness or juror is, of course, invaluable to the trial lawyer. He must make up his mind right “off the bat,” once and for all. If he guesses wrong—if he fails to observe what he should have observed, or gives undue weight to the things he does observe—he may lose his case or have to try it all over again. Both jurors and witnesses well repay study. About one man in ten is near enough to a real “nut” to make him dangerous as a juror or unreliable as a witness.

The kind of witness that lawyers and judges like to see in the box is the quiet, tractable, conscientious, unimaginative type that uses words in their ordinary sense and does not set up his own ideas in opposition to the judge.

To function as a cog in a smoothly running legal machine, the witness or juror must have a respect for law and a sense of obligation toward the State. You want a man who believes in the way we do things and who is not “agin’ the government”; one who is trying to give you the information you seek, not to instruct you about all the things he thinks you should know; one who answers your questions, and does not seize the chance to “show off.”

The world undoubtedly needs radicals and rebels, but we don’t want them on the witness-stand or in

the jury-box. You can't make their minds react to the due, normal, orderly processes of the law any more than you can sell a pound of coffee to the man who thinks that coffee is poisonous.

Now, how can you tell an erratic person when you see one? For one thing, personal traits are usually indicated by external appearance.

The clothes a man wears often reveal more than his face. The first rule I laid down for myself in the court room was to look out for fellows who wore bright red neckties. I do not refer to ordinary reds, but to the scarlets and vermilions of the Assyrian cohorts. The man who wears an article of dress calculated to challenge attention is usually an egotist or an eccentric.

It is, of course, vastly more important to find out whether the witness is telling the truth than whether he be "off-centre." He is sworn to tell "the truth, the whole truth, and nothing but the truth—so help me God!"

The final invocation is significant!—for no witness ever did tell the whole truth. Even if he wants to, he can't. Perfect accuracy is impossible, even for the man who tries to be honest. Moreover, there are just as many liars in court as there are outside. The only difference is that they are more afraid of being found out—and rightly so! The witness must answer each question definitely, and what he says is taken down by an expert stenographer. There it is, in black and white, ready to confound him until the day of judgment.

But suppose he has his nerve with him and has decided to go through with false testimony?

Most folks suppose that the perjurer is likely to give some telltale symptom, and that lawyers are full of sharp tricks to show him up. This is true only of witnesses of the lowest type of intelligence. Once a keen or an educated type of liar has decided that it is worth while to take the chance of being convicted of perjury, he will swear your life away gladly, gayly, and convincingly. He is the most assured and accurate of witnesses.

The liar on the witness-stand is not self-convicted by quivering lip and sweat-spangled brow. Not a bit of it! He is the one fellow who doesn't sweat. The sweater is the honest witness who is trying to recall exactly what happened and is having a hard time doing it under the badgering of the opposing attorney. The honest witness cares; the liar doesn't.

The human face is the part of the human body most subject to habitual control. If you want to find out whether or not a man is lying you would do much better to look at his feet and hands. Watch the fingers of a liar, and see how they twitch! Naturally, anybody's fingers may twitch from nervousness also. But tension due to the chance of being proved a perjurer will show somewhere. The liar tries instinctively to overcome this by gripping the arms of the chair in which he sits, or by clasping his hands. He is used to controlling his face, but not his extremities. Dislocate his hands from the chair or from each other, and you will have him

at a disadvantage. Over and over again I have seen shrewd and complacent witnesses lose their self-possession when told to unclasp their hands, or to take them out of their pockets.

I do not mean to suggest that the truth can ever be ascertained by the badgering or bullying of a person. It never pays to bully anybody. It merely arouses antagonism and leads to an even greater stubbornness on the part of the person bullied. I never knew anything to be gained by what is called "the third degree."

It is foolish to imagine that because you roar at a person he is suddenly going to collapse and confess himself a liar. The best way is to let him give himself away by leading him into the pleasant byways of conversational dalliance, where he has had no expectation of wandering and so is unprepared with his lie. Watch for what a man says about things that seem to him *unimportant*. Give him enough rope and he will almost always tie his own noose; not perhaps by contradicting himself on an important point, but by something he lets drop quite unintentionally. It is the unnecessary embroidery of a lie in which the liar gets entangled.

I remember where a witness, in describing how he had spent his morning, said that he had gone to buy a ready-made door, and then threw in a gratuitous statement that he had paid fourteen dollars for it. There was a carpenter on the jury, who knew that the cost of such a door was but nine dollars and seventy-five cents; on that point alone he turned

the jury and secured a verdict for the opposite side.

The memory is very unreliable—usually either a total blank or quite hazy about anything to which the attention has not been drawn sharply at the time. The minute a man begins to elaborate details about an event which occurred several months ago, you may know that he is drawing on some reservoir other than his own eyes, ears, and memory.

Try to reconstruct some scene that occurred this very morning, and see how much you can honestly recall. The chances are that you can be *sure* only of the fact that you were there. But let some one else tell you what *he* claims to remember of that scene—particularly if he be a person of positive and dramatic statement—and inside of an hour you will be likely to adopt his picture as your own recollection.

We are all susceptible, in an extraordinary degree, to suggestion. We see something that looks like John's hat, and we are ready to swear that we saw John's head inside it. It may not be even *his* hat.

There is not one of us who does not constantly believe and assert that certain things are true because he thinks they *must* have been true. In a cross-examination conducted for the purpose of trying to find out whether the husband of a witness actually left the house or merely went up-stairs, the following tidbit of testimony is illuminating:

"Did your husband lock the outside door after him?"

"Sure."

"How do you know?"

"He always locks the door."

"Did he have his hat on?"

"Certainly, he did."

"Did you see him?"

"No, but he *must* have put on his hat, *if he went out.*"

How much do we really see? Very little. We remember still less. The trial lawyer is always on the alert to detect signs of defective sight or hearing in a witness. A favorite test, where a witness has claimed unusual powers of vision, is to ask him to tell the time by the court clock. Incidentally, I recall one instance in which an attorney tried this test with amusing consequences. It was a murder trial, and the distinguished attorney for the defense had challenged an aged witness with this time-worn test. He himself had looked at the clock about an hour before, and had noticed that it was then nearly half past eleven.

The witness squinted at the timepiece and replied, after some hesitation, that it was half past eleven. The lawyer, knowing that this could not be the time, smiled broadly at the jury and remarked in a patronizing tone, "I think that will do for you, Mr. Jones!" and waved the witness from the stand. One of the jury uttered a guffaw, and soon the whole court room was laughing at the lawyer, who then discovered, to his discomfiture, that the clock had *stopped*—at half past eleven.

Witnesses will often pretend to be hard of hearing in order to explain some flagrant omission in their

testimony. Where a lawyer suspects that such is the case he may drop his voice by almost imperceptible degrees, and gradually move farther and farther away from the witness until it is apparent that the alleged defect does not exist.

The memory is quickly affected by weariness. No lawyer, if he can help it, will allow a witness to be cross-examined after the usual hour of adjournment, and he will try to jockey the procedure so as to allow a recess after the direct examination and before the gruelling cross-examination begins. It often happens that a witness, who has been so groggy at four P. M. as to be almost ready for the count, comes back bright and smiling when the gong rings at ten-thirty next morning. Vitality, "pep," self-control, and good nature are invaluable in a witness.

Children make remarkably effective witnesses. They are exceedingly observing as to details. Old people, while valuable as stage properties, or for some dramatic purpose, are no better, and usually have poorer memories, than the ordinary run of witnesses.

From the viewpoint of nationality, the most honest as well as the most law-abiding people come from the northern part of Europe—particularly from Scandinavia, Germany, and the British Isles. Negroes are marvellous witnesses, making up in enthusiasm whatever they may lack in veracity. They are natural actors, and inevitably paint a picture which the jury is unable to forget. Owing to their simple-mindedness it is not hard to tell when they are lying.

Persons engaged in the exact sciences, such as chemistry, physics or engineering, naturally tend to be exact in their testimony, and, in general, the more intelligent a witness the more likely he is not only to have observed but to remember what he has seen and to be able to describe it. However, he is likely also to be hampered, in giving his testimony, by a conscientious attempt to apply the absurd rules of the law of evidence as explained to him by the court.

I have never found much difference between witnesses from small towns or the country and those from big cities. You are as likely to find a liar in one as the other. But my experience would indicate that there is a laxer official tone in a small place than in a large one, owing perhaps to the fact that where everybody knows everybody else there is a natural disposition to allow sympathy to play a part in all life's relations and to go easy on wrong-doers.

Lawyers make the worst witnesses in the world. They can't see the woods for trees, and if they can see them they are afraid to say so, for fear they will say it in the wrong way.

The most obvious reason for the poor appearance of lawyers on the witness stand is that they feel obliged to obey and apply to their own testimony the complicated rules of evidence, which, if logically carried out, would render any intelligible communication from the witness-box impossible. They also are so eager to appear dispassionate and unprejudiced that their testimony is colorless and unconvincing.

Moreover, they are afraid of committing a technical perjury, being guilty of contempt, or—sometimes—of disclosing their own ignorance and stupidity.

A lawyer who testifies for a client often succeeds in losing the case for him. I remember a lawyer who had a man arrested and indicted for assaulting him. It was a plain case; but when he took the stand the defendant's attorney very adroitly remarked: "I do not wish to interrupt my Brother Smith while he is giving his evidence, and shall not do so, provided he agrees to confine himself to *strictly legal* testimony." So Brother Smith bowed and began:

"Last Friday I was proceeding along Broadway at the rate of about three and a quarter or possibly three and a half miles per hour, when somebody bumped into me. When I felt the bump and looked up, the defendant was standing close by. Of course I cannot swear positively that he was the one who bumped me, for I did not actually see him. He said loudly: 'You idiot, why don't you look where you are going?' I said: 'Mind your own business.' He made use of certain words which I do not now recall, spoken more loudly than ever. At the same time, he lifted his right arm. Then I felt a blow upon my nose. I cannot say that the defendant struck me, for I did not see his fist come in contact with my nose, but I immediately lost my equilibrium and fell backward upon the sidewalk."

The judge discharged the defendant, on the theory, I feel sure, that any man who could talk the way the lawyer did *ought* to get punched on the nose,

and that the defendant deserved the thanks of the court.

Women make effective witnesses because they are positive, insistent, dramatic, impatient of the restraints placed upon them by the rules of evidence. They are indifferent to the strict accuracy of their evidence so long as they testify in such a way that the right triumphs in the end. The "right" is almost inevitably the side of the case upon which they are aligned.

Generally speaking, women are more law-abiding than men. One reason for this is that they feel the need of the law's protection more than men. They have suffered for centuries from a legal inferiority and inequalities. Hence, they realize the necessity of an insistence upon the enforcement of *all* laws, especially those which safeguard their own rights.

A woman juror will obey the instructions of the judge more readily than her masculine associate, will convict where a man will not, and will mete out a severer punishment when she does convict.

More instinctively than men, women realize that the whole truth is greater than the isolated facts composing it. A woman feels justified in trying to give an impression of the truth as she sees it, at the expense of the facts, at least such facts as she can ignore. Even when a woman can be induced to answer the precise question put to her—which happens only infrequently—she always has a string tied to her answer. I once quite innocently participated in an illustration of this.

I was prosecuting a man for converting to his own use money entrusted to him by an old lady and her daughter for the purchase of real estate. There had been a long series of negotiations which, had the defense succeeded in getting them before the jury, would have hopelessly confused the issue. During the preparation for the trial I said to both ladies:

"Don't forget that the charge is that you gave him the money to put into real estate, and that he said he *would*. Nothing else is of much importance."

"Be sure and remember that, mother!" admonished the daughter.

The case came on and the old lady gave her testimony with great positiveness. The attorney for the defense arose to cross-examine her.

"Madam," he began courteously, "you say that you gave the defendant money?"

"I told him to put it into real estate, *and he said he would!*" she replied firmly.

"I did not ask you that, madam," politely interjected the attorney. "But, anyhow, how much did you give him?"

"I told him to put it into real estate, and he said he would!" repeated the old lady warily.

"But, madam, you do not answer my question!" protested the lawyer. "How *much* did you give him?"

"I told him to put it into real—" began the old lady again.

"Yes, yes!" cried the attorney. "We know all that! Answer the question!"

"—estate, and he said he would!" she finished triumphantly.

"If Your Honor please, I will excuse the witness, and I move that her answers be stricken out!" cried the lawyer savagely.

The old lady was escorted from the stand, but as she made her way toward the door of the court room she could be heard repeating stubbornly:

"I told him to put it into real estate, and he said he would!"

This reiteration had a powerful effect on the jury. Almost needless to say the man was convicted.

Women are difficult to cross-examine, for they are fully aware of the extent to which their sex shields them. They take advantage of this fact by dodging and by making statements of unwarranted positiveness.

Women are also more likely than men to confuse what they actually have observed with what they believe *did* or *should* have occurred.

An historic example of this occurred in the Twit-chell murder trial in Philadelphia. The defendant had killed his wife with a blackjack and, having dragged her body into the back yard, carefully *unbolted* the gate leading to the adjacent alley and, returning inside the house, went to bed for the purpose of creating the impression that she had been murdered by some one from *outside* the premises. To help carry out the suggestion, he bent a poker, smeared it with blood, and left it near the body.

In the morning the servant girl found her mis-

tress and ran shrieking into the street. At the trial she swore positively that she was first obliged to *unbolt* the gate in order to get out. The reason she swore this was because she had been *in the habit of* unbolting that door to get through it. Nothing could shake her testimony, and she thus unconsciously negatived the entire value of the defendant's adroit precautions. He was convicted.

A woman who is convinced of the truth of a fact almost inevitably will say that the fact is true of *her own knowledge*, although that knowledge is based on no more valuable an inference than that of anybody else. I remember the case of an apartment-house thief who stole many thousands of dollars' worth of gems, which he immediately removed from their settings.

It seemed a human impossibility to identify these diamonds, pearls, and emeralds, which had no distinguishing marks; but this offered no obstacle to the ladies who had lost them. They "knew" the thief had stolen their jewels, and they swore accordingly—overlooking the fact that the question was one beyond their power to *identify*. Here is the testimony of one of them:

"Can you identify that diamond?"

"I am quite sure that it is mine."

"Can you identify it?"

"It looks exactly like it."

"But may it not be a similar one, and not your own?"

"No, it is mine!"

"But how do you know? It has no marks."

"I don't care. I know it is mine. I swear it is."

Of course a pretty woman has a greater influence on a jury than a homely one, or a man. We like to distribute largesse, particularly if it doesn't cost us anything, and the jurymen who favors a pretty woman gains not only pleasure but an added sense of his own importance.

Now, life is a better teacher than *logic*. We can and do know things, without knowing *why* we know them. We act on our "sense" of the whole situation. If, for instance, we see a man dressed as a priest, we naturally conclude that he *is* one—and the chances are overwhelmingly in favor of our being right. If we see a man led into court between two officers and hear the clerk read an indictment accusing him of burglary—do we *really* presume him innocent? Not by a long shot!

When I was an assistant district attorney we tried a case in which an eminent member of the New York bar appeared as counsel for the defendant. He spent three whole hours in the elaborate selection of a foreman for the jury. At last, after rejecting at least a dozen reputable citizens for one reason or another, or for no reason at all except that he didn't like their looks, he accepted a solid-looking old German grocer.

The trial lasted several days, and the jury convicted the defendant almost without leaving the box. His counsel, greatly disgusted, vented his indignation rather loudly in the presence of the fore-

man. The old German leaned over good-naturedly and pointed to the door in the back of the court room leading to the prison pen:

"Vell, Mr. Smith, if you want to know vat I tink, I tells you. Ven I see him come in through dot leetle door back dere, den I *knows* he's guilty."

The law humanely provides that if a prisoner does not wish to testify his failure to do so shall not be taken against him by the jury. But does anyone imagine that a defendant is not usually obliged to testify if he expects to be acquitted? The very first thing we want to know about a person charged with crime is what explanation he has to make. If he refuses to make any, we know that he has none worth making.

A defendant in the old days was not permitted to testify. This was often very hard lines. In course of time he was "given the privilege of testifying"—which, in effect, *compels* him to testify. This new state of affairs has its own difficulties. Jurors have often said to me, regarding a defendant who did not take the stand: "Of course we couldn't hold against him his failure to testify, but we *knew* he was guilty, because he was afraid to subject himself to cross-examination."

Since it is necessary for the jury to be unanimous, any lawyer who expects to win, naturally, will seek to bring about harmonious conditions in the jury-room, while he who hopes for a disagreement will adopt contrary tactics. A jury which is sent out on an empty stomach to discuss the evidence is half

way to a disagreement at the outset. A hungry juryman is always a cross juryman. One cross juryman will set the whole panel by the ears. The wise lawyer will insist—so that the jury can hear him!—on giving them their lunch before sending them out to deliberate.

The same thing is true of the judge. If he is hungry or his lunch has disagreed with him, somebody will suffer for it. Heaven forbid that it should be the prisoner at the bar!

“The hungry judges soon the sentence sign,
And wretches hang that jury-men may dine,”

is not so true now as it was in Pope's day.

I am more inclined to think it works the other way, and that a jury acquits (not convicts) in order to avoid spending the night in the jury-room.

I recall a certain bank case where the evidence of the defendant's guilt was overwhelming. A vote taken on the retirement of the jury showed that they stood eleven to one for conviction. That juror was obdurate, however, and the situation remained unchanged for twenty-four hours, at the end of which period—it happened to be twelve o'clock on a Saturday—the judge sent word to the jury that he was going down-town and would not return until two o'clock. In some way the jurors got the idea that unless they agreed the judge intended to lock them up until Monday morning. So they asked for five minutes' time before the judge left the building. At the end of three minutes they had agreed—on a

verdict of not guilty. No one was more astonished than the defendant himself, for no more guilty person ever stood at the bar of justice.

Most jurors, like most other people, wish to be relieved of responsibility; they want to avoid exposing their ignorance or being put in an awkward or embarrassing position. Thus they welcome a foreman who has vigor and firmness. "Swinging the jury" is no idle term. Few people are sure enough of either their facts or their own opinions to stand up against a positive assertion one way or the other.

Incidentally, a prosecutor always tries to get rich men on a jury; a defendant's counsel wants poor men. The rich man is apt to think more highly of the institutions which protect his riches than the poor man, who has none and who may suspect that the system isn't all it is cracked up to be.

It is popularly supposed that dealing with criminal cases tends to make one cynical. My own experience, however, has taught me that human nature is a great deal finer than most people suppose. My fifteen-odd years in the criminal courts made me an optimist about my fellow men. The world is full of courage, kindness, and unselfishness. Most of the wrongs people do one another are due to fear, ignorance, or stupidity. Most of the ills man is heir to could be avoided by the use of ordinary foresight. We are our own worst enemies.

But one does learn the astonishing amount of egotism there is in the world, the almost preposterous credulity that men exhibit with respect to

what they are told of their own cleverness, and women as to their powers of attraction. There is no man who does not in his heart believe that if he got the chance he could show folks how to run these old United States; no woman, however homely, who cannot be induced to believe that she has a fatal power of fascination.

There is a constant stream of female dupes through the courts and up and down Fifth Avenue who have paid the price of vanity. There is an endless number of men who are doing the same thing. Yet, with all the foolishness in the world, one has to agree that most people are smarter than they look.

The average man is shrewd about his own affairs. He may be crassly ignorant about things in general, he may assume that Barcelona is sausage, but he will everlastingly get the better of you in his own particular business bailiwick.

Most people have strong racial and religious prejudices, often wholly unconscious. The witness or the jurymen is aware of something subtly different from himself in the person of alien race. A juror of a witness's own nationality may not particularly like him, and may even dislike him, but he feels that he understands him, and he instinctively sympathizes with what is said in his behalf. A Jew will almost always favor a Jew; an Irishman an Irishman; and—shall I say it?—an Elk an Elk.

In my early innocence I once prosecuted a man named Abraham Levy, who was defended by my old and able friend Mr. Abraham Levy; but I fool-

ishly permitted my astute friend, Abraham Levy, to jockey me into taking another Abraham Levy as foreman of the jury—and Abraham Levy was triumphantly acquitted.

Later I tried a murder case against an equally astute advocate, in which one of the jurors gave his birthplace as Schleswig-Holstein. When he summed up the case, the learned counsellor, addressing himself more specifically to the jurymen in question, said:

“In the beautiful country of Schleswig-Holstein sits an aged woman awaiting your verdict—which will either make her heart leap with joy or bring down her gray hairs in sorrow to the grave.” (Old S-H on the back row sat up and rubbed his forehead.) “There she sits in Schleswig-Holstein, in her cottage window, waiting patiently for her boy to return to her outstretched arms. Had the woman who so unhappily met her death at the hands of my unfortunate client been like the women of Schleswig-Holstein—noble, sweet, pure, lovely women of Schleswig-Holstein—I should have naught to say to you in his behalf.” (S-H leaned forward intently.) “But, alas, no! Schleswig-Holstein produces a liveliness, a virtue, a nobility of its own!” At this, S-H proudly expanded his chest, beamed upon the murderer at the bar, and refused to convict of anything but the lowest degree of manslaughter. After the verdict he learned with some astonishment that the defendant was an orphan Finn.

We all know how closely religion and blood bind

human beings together. It produces a peculiar kind of loyalty which can hardly be exaggerated. There are many other factors, outside the evidence, which are believed by habitués of the court room to affect the mental operations of men. Some of these "superstitions" are well founded—others are not.

It is believed, for instance, that Jews do not take much stock in the law of self-defense; that old men are indulgent, while men with long, drooping mustaches are the contrary; that preachers, missionaries, and uplifters are dangerous for both sides; that writers, editors, and publishers are "too intelligent"; that artists are crazy, romantic asses; that butchers, coffin-makers, sextons, grave-diggers, and undertakers have a natural predilection for capital punishment; that saloonkeepers take a lenient view of the shortcomings of humanity, and that hirsute idiosyncrasies, such as pompadours, "marcelles," or "yarb doctor" haircuts, indicate general unreliability. These are only of value in so far as they are popularly believed—the belief being sometimes a factor to be reckoned with.

Here are a few rules I have found to be sound both in the court room and out of it:

I. Do not accept as true what a person tells you, merely because you can't explain why you think he is lying or prove that what he says is false. Have faith in your instinct.

II. "*Falsus in uno, falsus in omnibus.*" (False in one, false in all.) If a witness, or anybody else, falsifies his story in any material particular, you

will be wiser to discount, if not discard, his entire testimony. The man who is inaccurate about one thing is likely to be equally inaccurate or deceitful about another.

III. Distrust the person who has seen too much or is too certain of all that he claims to have seen. Look out for the man who is unwilling to say, "I don't know!"

I have often heard a juryman, after listening to a fluent witness, whose words had poured out like an interminable torrent, say to him, "Answer me two questions: You were there? . . . You *saw* the defendant in the room? . . . Thanks. That is what I want to be sure of. I don't care about the rest."

IV. Never let any one you suspect of lying know your suspicion until you have satisfied yourself as to whether or not it is correct.

V. The jury will always believe that a man who testifies by rote is a liar. If you ask him a question about a fact out of its order it will confuse him. Such a witness must perforce go back to the very beginning and start afresh.

For example, a policeman will often commit his testimony to memory, and, while perfectly honest, play into the hands of the defense by beginning every answer with: "On the afternoon of May 5th, at about four-thirty in the afternoon, my attention was attracted by a disturbance on Fifth Avenue. I proceeded to the point in question," etc. If a "cop" says that twice, he will come pretty near to throwing your case, whether he wants to do so or not.

Witnesses often carry with them for use at odd intervals the affidavit or paper from which they have memorized their testimony.

Jeremiah Mason, a famous Massachusetts advocate, once said suddenly to a witness:

"Let's see that paper you've got in your waistcoat pocket."

The witness took a paper from the pocket and handed it to Mason, who read it aloud, showed that it corresponded word for word to the testimony already given by the witness, and that it was in the handwriting of the opposing attorney. When asked how he knew the paper was there he replied:

"Well, I thought he gave that part of his testimony just as if he'd heard it, and I noticed every time that he repeated it he put his hand to his waistcoat pocket and then let it fall again when he got through."

The same thing has occurred at least twice in my own personal experience.

VI. If there is a discrepancy or contradiction in a story, a missing link in the chain of evidence, never accept the story as a whole on the assumption that the missing link may be otherwise supplied or the contradiction somehow explained. A story must hang together to be true. The crook's glib explanation usually has but a single flaw, but it almost always has one.

So, probably, has the gossip about your neighbor.

IV

ANIMALS IN COURT

INTRODUCTORY

The author has no apology to make for the ostentatious erudition of the following pages, from which, in spite of other evidence to the contrary, the inference might be drawn that he was a man of learning, or at least of reading. One of the chief objections to lawyers arises from the fact that from the necessity of impressing courts and clients they acquire the habit of interlarding their daily speech with learned phrases in Latin, Law Latin, Norman French, and Dog Latin, and with references to the acts and pronunciamentos of kings, emperors, popes, presidents, governors, judges, bishops, archbishops, abbots, monks, military and other authorities of whom in fact they know nothing except their names. I myself habitually refer to Coke, Grotius, Pope Gregory the Great, Solon, Erasmus, Theognis, Bumble, and others without having the remotest idea who they were; and if I have ready to hand no names of sufficient dignity and authority to impress my auditors I make them up, being nobly assisted in my fraud by those present, none of whom are ever at a loss to know exactly what I mean and to whom I refer.

The information contained herein about the trial of animals in the Middle Ages is matter of record. I did not gather it, and I do not know who did. After all, it makes little difference. The bulk of it I took from a similar article in an old legal review written by an anonymous author, who no doubt stole it from some one

else, who in turn was doubtless, were the truth to be known, as much of a thief as his predecessor. But because my name is familiar to a great many light-minded people the statements contained in this book will soon acquire legal weight, and in a few years judges all over the country will cite in their opinions as an authority.

Thus:

“—As is stated authoritatively by Train in his work upon the law of animals; cf. ‘Trail of Bad Men,’ p. 125 et seq.”

“—As no less an authority upon this abstruse subject than the learned Train says in ‘Animals in Court,’ p. 137, *infra*, *supra*, and *ubique*.”

“—As that most authoritative work on the technical procedure in the prosecution of animals, Train on ‘Animal Law,’ p. 143 and note.”

Yet the abysmal state of my actual ignorance may be deduced from the fact that, having written this article some years ago, and one of the pages having become badly smudged in the meantime, I had to omit it entirely as I had no means of ascertaining the proper spelling of the names it contained.

IV

ANIMALS IN COURT

THE reported trial and conviction of a chimpanzee a year or so ago before a police judge for the crime of publicly smoking a cigarette in violation of the laws of Indiana; and, more recently the trial and conviction by a jury of a foxhound for killing sheep at Winchester, Ky., cannot fail to suggest to lawyer and layman alike a multitude of interesting speculations as to the law of animals, the rights and obligations of their owners, and the precedents for holding beasts, birds, and even insects personally responsible for their acts.

While the arrest of the chimpanzee aforesaid, who was being exhibited by a showman in a town near South Bend, may not have contributed much to "animal law"—and indeed may have been only the clever device of a press agent—it tended to indicate that Indiana's sumptuary law against "coffin tacks" was no mere idle parade of an elastic virtue. The animal performed his usual trick of smoking a cigarette, and was promptly arrested and haled before the local justice, who fined him five dollars. It availed the showman nothing to argue that it was no crime for an animal to smoke, or that the animal did not know what it was doing and could not possibly have any criminal intent; the judge

was adamant—the monk should pay five dollars or the monk should go to jail; and the owner paid the fine, on the theory, I suppose, that “*qui facit per alium facit per se.*”

Anyhow, that was the newspaper story—and it did not arouse much attention, if, indeed, it invited much credence, until “Old King,” a famous fox-hound of Clark County, together with his two pups, was charged under the Kentucky statutes with the crime of sheep-slaughter, tried by a jury—presumably of his peers—convicted, and sentenced to death—this sentence being afterward commuted to exile from the State for the rest of his life, while the two puppies were acquitted by direction of the court. The proceeding was taken under a local statute, similar to those in some other States and in Scotland and Canada.

In England dogs can be the subject of judicial proceedings, and as late as 1906 a dog was tried in Switzerland for complicity in the murder of one Marger, who was killed and robbed by two men, the animal being, in fact, the chief culprit.

Now, as everybody of course knows, under no theory of modern jurisprudence can an animal be made a plaintiff or a defendant in a litigation except by special provision of law. If they have any rights or duties of their own they are merged in those of the owner, whose property they are, or, if the animals are not owned by anybody, they are only protected from cruelty or destruction by statutes which, as in the case of migratory birds, are con-

cerned less with the rights of the animals themselves than with those of the public. It might almost be fairly said that an animal had no rights and no duties, save where by special legislation it was made individually liable for offenses, as in the case of "Old King." Then, of course, an animal should be entitled to all the rights of any accused.

But the idea that animals should not be held responsible for their acts would have been greeted with derision in ancient and mediæval times. Indeed by the law of England animals which caused the death of human beings were "deodand," forfeited to the crown, and either killed or sold for the benefit of the poor, as late as during the reign of Queen Victoria; while on the Continent animals were tried for their crimes, condemned and punished by mutilation, by hanging, or by being buried and burned alive until less than 200 years ago. The report of Berriat-Saint-Prix to the Royal Society gives a list of nearly 200 instances of the prosecution of animals between the beginning of the twelfth to the middle of the eighteenth centuries. Since he only cites the convictions, and as court archives of the Middle Ages are in large part lost or destroyed, and the cases imperfectly recorded at best, his list is probably a fragmentary one.

The most interesting feature of this amazing docket is that no bug, bird, or beast was too small to be accused of crime and placed on trial for its offense; and the defendants include caterpillars, flies, locusts, leeches, snails, slugs, worms, weevils,

rats, mice, moles, turtle-doves, pigs, bulls, cows, cocks, dogs, asses, mules, mares, and goats.

These animal trials are among the most picturesque incidents of legal history, and if read without explanation would seem almost unbelievably grotesque. Try to picture, for instance, what actually happened in 1386 at Falaise, where our American sportswoman, Mrs. Duryea, now has a stock farm. A sow running loose through the streets has bitten a child in the face and arm so that it has died. The ecclesiastical authorities cause the sow to be caught and impounded. They turn her over to the lay authorities of the town. A solemn trial is held, and the sow pronounced guilty of murder. The *Lex Talionis* is invoked—"an eye for an eye, a tooth for a tooth." Judgment is given that the sow shall be mangled and maimed in head and leg and then hanged. They send to Paris for an executioner. A pair of fresh gloves is given him. Then the sow *is dressed in a man's clothes, led out, and killed in the public square.*

This sounds like a mad dream. But starting with the premise that animals are responsible, the whole proceeding was in accordance with the theories and practices of the time. In the first instance the ecclesiastics generally took jurisdiction because one-third of France was owned by the monasteries and ruled by abbots, bishops, and other prelates. But the ecclesiastical courts could only impose canonical sentences—such as excommunication—and hence when the crime was deserving of death they de-

livered the defendant over to the regular courts for trial. These, like others in later days, including Poo-Bah in the "Mikado," endeavored when possible, as in the case of the sow of Falaise, to suit the punishment to the offense.

"My object all sublime, I shall achieve in time,
To make the punishment fit the crime, the punishment
fit the crime."

Hence the old Levitical law was followed—which, besides providing for punishments of a character similar to the injuries inflicted, expressly authorized and enjoined the execution of animals. Thus it is written in the twenty-first chapter of Exodus at the twenty-eighth verse: "If an ox gore a man or a woman, that they die; then the ox shall be surely stoned, and his flesh shall not be eaten."

The dressing of the animal in man's apparel was undoubtedly to indicate its equal responsibility with human beings. The new gloves for the executioner were in order that he might come from his duty with clean hands and to show that as a public official he incurred no guilt in shedding blood.

These strange legal records bristle (so to speak) with the trials and executions of pigs: and for a very simple reason. Pigs, in mediæval times, ran wild all over France, and were so numerous and so dangerous that any one was free under the law in many places, Grenoble, for instance, to kill them on sight. Hence they appeared more frequently than any other animals at the bar of justice.

The bill of the sheriff of Mantes and Meullant for executing a sow, dated March 15, 1403, runs as follows:

"Item, cost of keeping her in jail, six sols parisisis.

"Item, to the master of high works, who came from Paris to Meullant to perform the said execution by command and authority of our said master, the bailiff, and of the procurator of the king, fifty-four sols parisisis.

"Item, for cords to bind and hale her, two sols, eight deniers parisisis.

"Item, for gloves, two deniers parisisis."

Such bills are very frequent in the archives, and include items for pigs' board at two deniers a day and "ten deniers tournois" for "a rope to keep her from getting away."

Pig cases in those days were as common as dog cases now. In 1394 a pig was found guilty of the murder of a child in the Parish of Roumaygne, and condemned to be hanged.

In 1457 a sow and six sucklings were convicted of the murder of a child named Jehan Martin of Savigny. The six piglets were restored to their owner, Jehan Bailly, in default of sufficient proof, on condition that he should give bail for their reappearance in case of further evidence being obtained. About a month later he refused to be responsible, and they were thereupon declared forfeited to "the noble damsel Katherine de Barnault, Lady of Savigny."

In 1266 at Fontenay-aux-Roses (near Paris), a pig

which had eaten a child was publicly burned by order of the monks of Sainte-Geneviève.

Many interesting legal points of law were settled in these pig cases.

In 1572 a pig was condemned for murder within the jurisdiction of the monastery of Noyen-Moutier, and sentenced to be hanged. The justiciary of the lord abbot had, by immemorial custom, always delivered criminals condemned to death to the provost of Saint-Diez wholly naked. The point was raised that if the particular pig had been led or bound with a rope to the provost for execution, this might have done away with this precedent, to the pecuniary damage of the lord abbot through the loss of the confiscated raiment. For a roped pig was, technically at least, not a naked pig, but it was held that "inasmuch as this pig is a brute beast, he has delivered the same bound with a cord without prejudicing or in any wise impairing the right of the lord abbot to deliver condemned criminals wholly naked."

The religious enthusiasts of the Middle Ages were ready to prosecute pigs and sows, not only on account of their habits and numbers but because they were always suspected of being possessed with devils. Many contemporary references exist to the Gadarene swine of the New Testament, which rushed down and cast themselves into the sea after having been so possessed. Indeed it was widely held and even taught by Thomas Aquinas, the greatest theological authority of mediæval times, that all beasts

were but the embodiment of evil spirits. And more recently Père Bougeant, a French Jesuit, has sought to demonstrate the same theory in a philosophic thesis.

This may seem less incredible if it be realized that people have been put to death for being witches, within less than a century, in supposedly enlightened Europe. Mediæval law was the subject of the same metaphysical hair-splitting, carried out to the same absurd conclusions, as was mediæval theology. Indeed they were both the children of superstition and ignorance, unconsciously influenced by classic mythology. Spinoza and Hegel are step-brothers to the Greek pantheists. The learned doctors who debated with such acumen the question of how many angels could tiptoe on a needle's point, saw nothing astonishing in the proposition that a dog or pig was a wandering incarnate child of Satan, and were sincere and astute in devoting to such cases all their legal lore and the most attenuated finesse of their logic.

They were not so ridiculous after all. So far as the writer is aware there is no legal definition of the term "human being," and he has often speculated upon what would be the result if the "Missing Link" fell upon and foully did to death the "Wild Man of Borneo"; for murder requires "the killing of one human being by another." Would it not be difficult for even the most adroit district attorney to establish the necessary elements in such a case? Indeed, we can easily imagine a trial lasting for months, or

even years, where all the greatest physiologists, zoologists, and biologists should testify to what really made a man a man rather than a monkey.

Well, if the "Missing Link" may be a man in the contemplation of law, why should not a dog? Or a cat be a woman? In the "Island of Doctor Moreau" H. G. Wells portrayed human beings manufactured out of parts of different animals. Black cats have always been viewed askance. One can easily see how, once grant that animals are evil spirits, they should be held responsible, either to man, represented by the police authorities, or to God, as represented by the ecclesiastical; and how, even if a normal, common pig might with leniency be viewed as immune for ordinary peccadillos, that a naughty, wicked pig whose hoofs, snout, and bristles Satan had adopted as a disguise—a devil in pig's clothing as it were—should not be allowed to escape punishment for his sins simply because he was ostensibly a pig. Were that so, anybody could bribe a witch to turn him into a pig and go about doing as he chose—wholly without restraint.

In this connection it should be remembered that in ancient times even inanimate objects were regarded as possessed of personality. The gods or spirits were everywhere, inhabiting tree-trunk, rock, and rill. Rivers, mountains, statues, bushes, birds, and animals thought and talked. In law all that is needed for "responsibility" is what is called "animus," and "animus" is a Latin word literally meaning wind, but used to denote the "rational soul,"

intellect, consciousness, and hence will and intention. Theoretically one could not have an evil intention unless one had a rational soul; but the ancients argued that a spirit had a rational (if lost) soul, and hence was subject to criminal prosecution. An age that endowed trees and rocks with personality saw nothing absurd in adjudging them deserving of punishment or exile. It will be recalled that, Joshua finding spoils hidden in the tent of Achan, "his sons and his daughters, and his oxen and his asses, and *his tent and all that he had*" were taken into the Valley of Achor and there stoned and burned with fire—showing the tendency not only to impute the guilt "of the father to the children" but to his possessions as well—which may be a phase of what Fraser calls "sympathetic magic."

The Draconian law required weapons and all other objects by which a person had lost his life to be publicly condemned and "thrown beyond the boundaries." This sentence was pronounced upon a sword which had been used in the murder of a priest, as well as upon the bust of the poet Theognis, which had fallen and killed a man. Thus the statue of the famous athlete Nikon of Thasos, which had been pushed by his enemies from its pedestal, having in its fall crushed one of its jealous assailants, was brought before the proper tribunal, tried, and sentenced to be cast into the sea.

So it is not surprising that animals should have been treated in similar fashion, even in later centuries, or at any rate that the propriety of so doing

should have been made the subject of solemn disputation. Indeed it is not impossible that a reverberation of the ancient habit of attaching guilt to the instruments used in a crime is to be found in our modern statutes providing for the destruction of dangerous and unlawful weapons, of gambling instruments upon a verdict of guilty against their owner, and in the forfeiture of property offered for disposal by lottery and of commodities exposed for sale on the Sabbath. The dead hawk, nailed by the farmer over the barn door, may be an unconscious reflection of the early instinct that birds and beasts could have a criminal animus, and were morally responsible for their acts.

There is a distinct trace of what we may not unnaturally regard as this rather childish disposition to punish irrational creatures and inanimate objects as well in that picturesque doctrine peculiar to English jurisprudence, that anything "in motion" which caused the death of a human being was forfeited to the crown, or should be sold for the benefit of the poor. "Whatever moves to the death is a deodand," was the phrase. As put in the "*Termes de la Ley*" (or, as we should say, "*Dictionary of Legal Words and Phrases*") a curious cache of antique law:

"Whatever moved to kill the dead
Is deo-dand, and forfeit-ed."

Thus a horse that kicked a man to death was deodand, and so was a knife, an axe, a stove, a cart,

or a mill-wheel. Where the object involved was without motion only that part of it proximately connected with the death was forfeit, but if the whole was in motion, the whole was deodand. If a carter in getting into his wagon which was standing, slipped from the wheel and died of the fall, the wheel only was deodand; but were the cart moving the entire vehicle, including its load, was forfeited. There is a recorded case of where a man fell from a mill-wheel into the race and was drowned, and the whole works were declared deodand because the mill was in operation at the time. This anachronistic doctrine, along with wager of battle, by virtue of which a murderer might challenge his accuser to fight it out with clubs, was still the law of England down into the reign of Victoria. This was the last application "of a penal principle which in Athens expatriated wood and stones, and in mediæval Europe excommunicated bugs, and sent beasts to the stake and to the gallows."

But the delicate question of whether animals should be made the subject of excommunication by the church was not settled without profound discussion. Bartholomew Chassenée had defended successfully the rats of Autun, by claiming that his clients, when summoned before the tribunal, were entitled to a safe conduct to court. The judges held this to be reasonable, and ordered all cats in the parish to give bonds not to molest the defendants. The cats failed to do this, and at the next hearing the case was adjourned *sine die*. The learned *avocat*

had already secured considerable delay by protesting that the original summons was defective for failing, as we would say, to join all the parties, *i. e.*, to cite *all* the rats in *every* parish, as well as by the pathetic plea that many were old and sick and should be given a further extension of time, but his last coup about the cats, by which he got all the rats off entirely, won him undying fame. From that time on he was undoubtedly retained in every animal case. It is worth bearing in mind that this was all done with the utmost seriousness.

Chassenée eventually produced a learned work in which he established to everybody's satisfaction—except the defendants immediately involved—that it was quite proper to excommunicate animals by anathema or, if they did not reform or conform to a decree directed against them by the church, to turn them over to the lay authorities for capital punishment. This somewhat paradoxical conclusion was reached upon the application of the townsfolk of Beaune for a decree of excommunication against the harvest flies. The real question was not whether animals could be held criminally responsible and punished, but whether they were proper subjects for the anathema, and if so whether they could claim “benefit of clergy” and so escape criminal process at the hands of the state authorities. Usually for the reasons heretofore pointed out, the matter was in the first instance an ecclesiastical one. And the first move was for the proper church official to read the riot act to the

offenders and order them to move on. Then, if they did not do so the bishop delivered an anathema against them. This usually accomplished very little, so the vital issue remaining was whether you could turn an excommunicated animal (whom you had originally proceeded against in the ecclesiastical courts) over to a common hangman or sheriff. In a word, did you not oust the lay court of jurisdiction by first treating the animals as under church discipline? Chassenée said absolutely not.

(A) It was all right to anathemize or curse a bird, bug or beast, because:

1. God cursed the serpent in Eden;
2. David cursed the Mountains of Gilboa;
3. Christ animadverted upon the withered fig-tree, saying: "Every tree that bringeth not forth good fruit is hewn down and cast into the fire." This, the *avocat* claimed, clearly implied a punishment of the tree. "If therefore," he argued, "it is permitted to destroy an irrational thing because it does not produce fruit, much more is it permitted to curse it, since the greater penalty includes the less."

Having thus disposed of one aspect of the matter he then proceeded to settle the other:

(B) Animals should be tried by ecclesiastical courts in accordance with the precedents to be found in Holy Writ, unless the penalty involved the shedding of blood contrary to the canonical law, in which latter case they should be tried by the regular authorities. He arrived at this seemingly inconsistent conclusion by the following ingenious argument:

Even if an animal had been made the subject of ecclesiastical proceeding at the start, this did not preclude a lay trial or punishment later on, for they were either (a) laity or (b) clergy.

Now there being no reason to assume as matter of law that animals were clergy, they could and should be presumed to be laity. If they wished to claim "benefit of clergy" and that in consequence only the ecclesiastical courts had jurisdiction over them, it was up to them to do so by proving that they could read and write or were otherwise entitled to it.

This irrefutable logic met with universal approval, and thereafter the animals got it coming and going.

In 1369 the Carthusians at Dijon caused a horse to be condemned to death for homicide.

In 1474 the magistrates of Basle sentenced a cock to be burned at the stake for laying an egg. This was the famous *œuf coquat* of mediæval mythology, supposed to be "the product of a very old cock, and to furnish the most active and efficient ingredient for witch ointment. When hatched by a serpent or by the sun it would bring forth a cockatrice, which would hide in the roof of a house and with its baneful breath and 'death-darting' eye kill all the inmates." Everybody believed in the cockatrice and basilisk, and their habits and customs were everyday topics. In 1710 the French savant Lapeyrouie read a paper before the Académie des Sciences "to prove that the eggs attributed to cocks owe their

peculiar form to a disease of the hen," and this has recently been demonstrated to be so.

In 1499 the judiciary of the Cistercian Abbey of Beaupré sent a bull to the gallows for having "killed with ferocity" a lad of fifteen.

A good start having been thus made against the larger animals, the birds, bugs, and vermin were given their day in court.

In 1487, on August 17th to be exact, the Cardinal Bishop of Autun warned an army of slugs, which was devastating the grapevines of the locality, to desist and go away or take the painful consequences, *i. e.*, excommunication; and on September 8th of the year following, a similar order was issued at Beaujour. The record is silent as to what happened, although we are told that the Bishop of Lausanne successfully freed Lake Lemman from eels, which had become so numerous as to interfere both with bathing and boating, by threatening them with anathema. Saint Bernard excommunicated a huge swarm of flies in the Abbey Church of Feigny, and they all died in their tracks. The chronicler apologizes for this apparent callousness by explaining that "the saint resorted to this severe and summary punishment because no other remedy was at hand." In 1584 the Vicar-General of Valence prosecuted a plague of caterpillars which had appeared after an unusual spell of wet weather. He was adverse to excommunication in the first instance, and devised a combination treatment for their more merciful extermination, consisting of "prayer, holy water, and

adjuration," which method having been kept up for three months, they withered away—miraculously. It is recorded that a heavy frost occurred about this time, which may have had something to do with the efficacy of the method adopted.

A certain kind of vermin called *inger* was thus warned by the Bernese Curate Schmidt:

"Thou irrational and imperfect creature the *inger*, of which there were none in Noah's ark, by the authority of my gracious lord the Bishop of Lausanne, in the name of the ever lauded and most blessed Trinity, through the merits of our Saviour Jesus Christ, I command you, each and all, to depart within six days from all places in which food for man springeth up and groweth." But the *ingers* paid no attention, and the anathema which followed proved mere *brutum fulmen* owing, says the historian, "to our sins."

In 1519 the Commune of Stelvio, in Western Tyrol, prosecuted the moles, and a procurator was charged with their defense, who secured a mitigation of the sentence to perpetual banishment by an order that "a free safe conduct of fourteen days be allowed to those which are with young."

Felix Malleolus, in his "Tractatus de Exorcis," says that in the fourteenth century peasants in the Electorate of Mayence brought complaint against some Spanish flies, but "in view of their small size and the fact that they were not yet come to their majority," the judge appointed for them a curator, who "defended them with great dignity," and al-

though he was unable to get them off or prevent their banishment, he obtained for them the use of a piece of land to which they could retire.

In Protestant countries the priest or exorcist was superseded by a professional conjuror, and less than seventy-five years ago a wizard was successfully made use of in Westphalia to drive out the worms which infested the country. The report attributes the excellence of the results obtained to "the force of human faith, the magnetic power of a firm will over nature."

But meanwhile the birds had been making themselves objectionable, and in 1559 Augustus, Duke of Saxony and Elector, by a decree published in Dresden, commended the "Christian zeal" of a worthy parson, Daniel Greysser, for having "put under ban the sparrows on account of their unceasing, vexatious, and great clamor and scandalous unchastity during the sermon, to the hindrance of God's word and of Christian devotion."

Similarly did Egbert, Bishop Trier, anathemize the swallows which disturbed the devotions of the faithful and defiled his vestments while officiating at the altar. He forbade them to enter the cathedral; and it is still believed that if a swallow flies into the great door, it instantly falls to the ground dead—a victim of the bishop's curse.

Unfortunately the officials charged with carrying out the orders of the courts and doing execution upon the unfortunate defendants were brutal men, hardened to the sufferings even of human beings,

and many acts of cruelty are recorded as being inflicted upon the dumb and helpless beasts.

In 1565 a mule, having been condemned to be burned alive, the executioner cut off its feet—in order that it might less effectively protest against its punishment; and in 1576 at Schweinfurt, Franconia, a sow which had bitten a child was turned over to the local hangman, Jack Ketch, who without more ado, and without trial or judgment or warrant, took it to the gallows green, and there “hanged it publicly, to the disgrace and detriment of the city.” The indignation aroused by this summary and illegal act compelled him to run away, and he never dared return. This would seem to indicate an unusual degree of fairmindedness for that era.

Many of these ancient records shed an illuminating light upon customs which might otherwise be misinterpreted, or remain unintelligible. Thus we read that a pig, having been convicted of murder, was ordered put on the rack that a confession might be extorted. At first glance this appears both absurd and barbarous. But it was consonant with the meticulous regard for legal process by which animals seem always to have been tried, and the act itself was in the interest of mercy, since the rule was that, for those who were subjected to the torture of the rack and did not confess, the death sentence should be commuted to banishment. As, obviously, an animal could not confess, it is equally clear that the order in question was a mere form to avoid the necessity of killing the pig. There are also cases where

appeals taken on behalf of animals sentenced to death resulted in acquittals, and in some instances in commutation to other forms of punishment. This regard for animal rights is noteworthy in an age when the law required incendiaries to be burned alive, and a man who moved a boundary stone to be buried up to his neck and have his head ploughed off; in societies where it was etiquette for a monarch before whom an ambassador did not remove his hat to order it nailed down solid upon the offending head, as did the Muscovite prince, Ivan Basilowich.

Animal prosecutions not only became more and more technical but were gradually attended with more and more cruelty. In the seventeenth century they were particularly frequent, so that they were made the subject of caricature upon the stage in Racine's "*Les Plaideurs*," where a dog is tried for eating a capon, with all the solemn formalities of the period as well as with great learning and eloquence. After his conviction and sentence to the gallows his pups are brought into court and an appeal for mercy made on their behalf. While to-day it all seems the broadest farce it had, like many other contemporary literary efforts, a deep significance and, it is to be hoped, had a beneficial effect upon the customs of the time, for the punishments inflicted were extremely severe and animal process the occasion of grave abuse.

Yet with all the attention given to the technical aspect of legal procedure against animals the lawyers and judges of the Middle Ages evolved no help-

ful principles respecting their rights and liabilities which have come down to us. Animals still occupy an ambiguous place in the law, which only recognizes that they have rights by protecting those of their owners, and only adjudges them to have duties by enforcing them upon their masters. It is not inconceivable that in some future age the doctrine may obtain that the animals have the same right to life, liberty, and the pursuit of happiness as ourselves. It does not require much of either sympathy or imagination to recognize the theoretical justice of this in the case of the domestic animals, but it would demand more in that of the wild carnivora, reptiles, and insects. In the event of the general acceptance of any such principle the question of when an animal is not an animal would become of considerable interest.

Nowadays when animals are guilty of mischief, theft or violence we look not to them but to their owners for the purpose of fixing criminal responsibility, and if the owner can be shown to have used the animal as his instrument or agent, we visit upon him the retribution which a few centuries ago would have been inflicted upon the animal. Thus attacks by vicious dogs are sometimes made the basis for criminal indictments charging their owners with criminal assault, and the writer once prosecuted a man who had "sicked" his dog on an enemy, under an indictment charging that the defendant "feloniously did wilfully and wrongfully make an assault in and upon the legs and body of him, the said —,

by means of a certain dangerous weapon, to wit, one dog, then and there being within control of the said —, which said dog, the said — did then and there feloniously, wilfully, and wrongfully incite, provoke, and encourage, then and there being, to bite him, the said plaintiff, by means whereof said dog did then and there grievously bite the said plaintiff in and upon the legs, buttocks, and body of him, the said plaintiff, and the said — thus then and there feloniously and wilfully and wrongfully cut, tear, lacerate, and bruise, and did then and there by means of the dog aforesaid feloniously, wilfully, and wrongfully inflict grievous bodily harm upon the said —," etc., etc.

In other words, what you do by means of another person, beast or thing you do yourself—"qui facit per alium, facit per se." The thief who trains a rat or ferret to find its way into a dwelling house through the piping and steal jewelry or small objects of value, the murderer who teaches a parrot to fly through the open window into his enemy's bedroom and turn on the gas—is just as guilty as if he had physically committed the act himself—but the animal accomplices are not viewed as having any individual responsibility. They are merely the implements.

Now while we no longer hale animals into court and prosecute them criminally at the bar of justice, they frequently make their appearance there in an evidentiary capacity—practically as witnesses. The records are full of instances where ownership or some

doubtful issue of fact has been determined to the satisfaction of judge or jury by the action of an animal in the presence of the court.

One of the prettiest of these stories is that told by Lord Campbell in his "Lives of the Chancellors" of Sir Thomas More's only recorded judgment while in office, which he gives in the language of the reporter:

"It happened on a time that a beggar-woman's little dog, which she had lost, was presented for a jewel to Lady More, and she had kept it some se'night very carefully; but at last the beggar had notice where the dog was, and presently she came to complain to Sir Thomas, as he was sitting in his hall, that his lady withheld her dog from her. Presently my Lady was sent for, and the dog brought with her; which Sir Thomas, taking in his hands, caused his wife, because she was the worthier person, to stand at the upper end of the hall, and the beggar at the lower end, and saying that he sat there to do every one justice, he bade each of them call the dog; which, when they did, the dog went presently to the beggar, forsaking my Lady. When he saw this, he bade my Lady be contented, for it was none of hers; yet she, repining at the sentence of my Lord Chancellor, agreed with the beggar, and gave her a piece of gold, which would well have bought three dogs, and so all parties were agreed; every one smiling to see his manner of inquiring out the truth."

A similar instance occurred in the time of Lord Eldon:

"When I was Chief Justice of the Common Pleas

a cause was brought before me," says he, "for the recovery of a dog, which the defendant had stolen in that ground (lying in the fields beyond his house), and detained from the plaintiff, its owner. We had a great deal of evidence, and the dog was brought into court and placed on the table between the judge and witnesses. It was a very fine dog, very large and very fierce, so much so that I ordered a muzzle to be put on it. Well, we could come to no decision; when a woman, all in rags, came forward and said, if I would allow her to get into the witness box, she thought she could say something that would decide the cause. Well, she was sworn just as she was, all in rags, and leant forward towards the animal and said: 'Come, Billy, come and kiss me!' The savage-looking dog instantly raised itself on its hind legs, put its immense paws around her neck, and saluted her. She had brought it up from a puppy. Those words, 'Come, Billy, come and kiss me!' decided the cause."

"This evidential use of the behavior of animals," states Professor Wigmore, "is well established in judicial practice, though it has seldom been brought before courts of appeal."

V

FOOLISH LAWS

INTRODUCTORY

The following collection of legislative absurdities is reprinted here for the amusement of the reader, whose interest may have become jaded by the intense seriousness of the preceding pages. In justice to our State representatives it should be said that these examples of carelessness and idiocy are all that I could assemble, although I hired a trained legal ferret to suck every egg he could find. Therefore, instead of concluding that most of our lawgivers are asses, we perhaps should compliment ourselves that out of the thousands of statutes annually passed by the several States there is so little nonsense. The ordinances and statutes here printed are negligible in comparison with the multitude of laws annually passed, most of which have meaning, many of which are intelligible, and a few of which are even grammatical. This is to say, merely, that the foolish part of what follows should not be taken seriously, and that the serious part should be taken foolishly, if at all.

V

FOOLISH LAWS

CHARLES F. SOUTHMAYDE, one of the greatest lawyers of the last generation, was so fearful that he might become a lawbreaker that he employed counsel to watch the many statutes introduced into the New York Legislature lest he might, without knowing it, commit some misdemeanor that would land him in jail.

His apprehension of these "man-traps," as he called them, was genuine and fully justified in view of the flood of ill-considered, trivial, and grotesque laws with which the country was and is being deluged.

During a recent five-year period there were passed over 62,000 laws, State and Federal, to interpret which required 65,000 decisions of courts of last resort, filling 630 volumes; our legislative harvest is upward of 15,000 statutes per annum. To-day the greatest obstacle to legal reform is the obsession of the American people for making laws, which in the 132 years that have elapsed since the adoption of the Federal Constitution have exceeded in number and bulk the total of all the laws enacted for the government of mankind from the time of Adam to the inaugural of Washington. There is no subject which escapes governmental regulation either in the heavens above, or upon the earth beneath,

or in the waters under the earth. No other country is as statute-ridden as these United States.

No one in the country avoids violating some law at least once a year, and probably the majority of the men, women, and children of our population break some law, ordinance, order, or regulation nearly every day of their lives. The maxim that "every man is supposed to know the law" has ceased to be even a legal fiction. Nobody does, nobody can, know the law or a thousandth part of it. By the time anybody gets to know one law there is already another in its place. If an attempt were actually made to enforce these unenforceable and never-intended-to-be-enforced statutes, hopeless chaos, both industrial and social, riot, bloodshed, and governmental paralysis would inevitably result.

What prevents the explosion is the fact that nobody takes seriously such laws as are not supported by public opinion and that the bulk of them are rarely if ever enforced.

Mr. Southmayde's terror of becoming a law-breaker was no mere nightmare. The writer gladly stakes whatever professional reputation he has upon the assertion that there is no automobile run in New York City that does not violate the traffic laws at least ten times each day, for *it is against the law and punishable with fine and imprisonment to go around a corner at more than four miles an hour.*

It is also an offense punishable by fine or imprisonment, or both, to fail to tie up securely the newspapers in one's garbage-can or to fill it to within

less than four inches of the top, to beat a rug on the front stoop, to carry an unmuzzled dog no matter how small, to use the hose on the sidewalk after 8 A. M., to fail to have one's chauffeur wear his motor-badge on his coat, to have awnings that extend more than six feet from the house line, to fail to keep one's curbstone at the right level, to have one's area gate open outwardly instead of inwardly, to fail to affix one's street number to your fanlight or front door, etc.

No citizen could keep up with the laws and have time to earn his living. We are swamped by the flood of statutes, ordinances, regulations, rules, orders, and official interpretations of laws passed by our National Congress, State legislatures, boards of aldermen, commissioners, and governmental departments. There is nothing too intimate or too trivial to escape supervision and control under threat of imprisonment, be it the sin of expectoration or the length of bed sheets.

There is, to be sure, nothing shockingly new in this; Greece and Rome tried their hands at parentalism and sank under the burden. There have always been too many laws everywhere. The astonishing thing is that we, rooters for "liberty" as we are, have not profited by the example of other nations. Nearly 400 years ago Montaigne declared:

"There is no man so good who, were he to submit all his thoughts and actions to the laws, would not deserve hanging ten times in his life"; and "I am further of opinion that it would be better for

us to have no laws at all than to have them in so prodigious numbers as we have."

In former days when any new evil was discovered in England it was at once made a felony without benefit of clergy, *i. e.*, punishable with death. The list of capital offenses grew until there were 200 crimes for which a man could be hanged. Precisely the same attitude exists in our modern legislatures as led to the barbarities of the English law.

Where every business, profession, and sport is hedged about by statutes even the careful citizen runs a fair chance of unintentionally crossing the dead-line. Mr. Southmayde's anxieties appear perfectly natural. One would have to be a student to avoid becoming a criminal.

The more laws there are the harder it is to enforce them, and when what might be called "the legal saturation point" is reached—where owing to their very multiplicity they cannot be enforced—they become either laughing-stocks or instruments of blackmail.

Besides, telling people they mustn't do things always has a peculiar effect upon their psychology. The ordinary citizen resents being told to keep off the grass. He has not the slightest objection to the warning for other people—in fact, regards it as a good thing—but he instinctively feels that in his own particular case the injunction is unnecessary, rather frivolous, and slightly offensive. He has heard of the legal maxim "*de minimis non curat lex*" ("concerning trifles the law does not trouble itself")

and he regards the sign as a violation of that principle. He never intended to go on the grass anyway. But now the idea having been suggested to him he begins to entertain a subtle yearning to go on the grass—and perhaps he does. It may be the first step in his career as a lawbreaker; the sign is largely responsible; and who, alas! shall say what the result may be?

Of course generally nothing happens. The cop does not see him—since naturally the citizen takes pains that he shall not do so. At once Mr. Ordinary Citizen suspects that there is something rotten somewhere. Why didn't the cop see him? What is the cop for? Why do they have such an ordinance if it is not going to be enforced? In fact he may work himself up into a state of real indignation over his own immunity from punishment for an offense so flagrantly committed. That is the second step in his downfall!

For the very next time Mr. Ordinary Citizen finds himself confronted by a legal prohibition he is apt to pause and ask himself whether this is one of those laws that mean what they say and are actually intended to be carried into effect. He has now logically reached the interrogative state—that so widely attributed to folk “from Missouri.” The mere fact that a law is a law is no longer enough for him. He wants to be “told.” What kind of a law is it? Will anything really happen to him if he violates it? Is it going to continue to be the law after the first of next January? How far can he

go and still be within it?—a very unfortunate frame of mind for any citizen to be in!

Now, speaking quite frankly, the general attitude of our citizenry toward the laws affecting their own immediate conduct is not one of enthusiastic obedience. At best it is reluctant; frequently openly recalcitrant. Mr. Ordinary Citizen inclines to believe that so far as he is concerned there would be no need of any laws at all. The State could safely leave his conduct to him. He realizes that he can't get along without government—that but for it society would go to pieces—and that he has got to surrender some of his liberty for the sake of self-protection; but his attitude toward the State is usually tinged either with hostility or contempt—the old machine is either being clumsily administered by his friends or in process of being wrecked by his political enemies. He never has an unqualifiedly good word for the government in office, either National, State, or municipal, but is either apologizing for it or cursing it out.

He resents being bullied by the traffic policeman, hates serving on the jury, revolts at having to make out income-tax returns, is pretty sure that the city government is crooked and the legislature composed of a bunch of grafters, and is convinced that the State officials, even if he voted for them, are a lazy, overpaid, stupid lot of cheap politicians, any one of whose jobs he could handle a hundred times better than the incumbent. He is an outsider and suspects all the insiders. He forgets, except at elec-

tion times, that he has any share in the show; and usually is glad to disclaim responsibility for the cast and its performance. He has a sneaking malevolence toward all office-holders, save when he wants a favor. Except in war-time he has much the attitude toward authority—unless he is actually in process of being burglarized or assaulted—as the law-burdened subject of any absolute monarchy. He is loyal and patriotic—long on Uncle Sam, Old Abe, and The American Eagle—but awfully short on the politicians—a bear on those fellows up at the State capitol.

Let us concede at the outset that Mr. Ordinary Citizen's point of view is that of a disgruntled growler and wholly unfair to the legislators; but it nevertheless remains true that his attitude of mind toward what the prayer-book calls "the civil authority" is a very important matter. Collectively it is the most important matter there is.

Now why does the citizen entertain such disrespectful feelings for the laws by virtue of which he lives and moves and has his civic being? First, because so many of them are hypocritical and were never intended to be enforced—being merely moral window-dressings; second, because many of them are so paternalistic, trivial, and silly that they are unenforceable; third, because the ones that are passed with a sincere purpose are often so carelessly, ignorantly, and inartistically drawn that they stultify themselves and those who try to enforce them; and lastly, because there are so many

laws that people can't keep track of them, give up trying to, and let the laws go hang.

Every unenforced or unenforceable statute breeds a general distrust toward all other statutes, a distrust of the soundness of our institutions, the efficiency of our government, and of the integrity or ability of our public officials. Hypocrisy in legislation is the most dangerous form of hypocrisy, because it is National and State hypocrisy. Anything in fact that brings the law under suspicion or into disrepute strikes at the root of our democracy. It's not enough to say that nobody wants such a law anyway; for that is but a license to any portion of a community, the majority of which does not like a particular law, to disregard it.

Our hypocritical, paternalistic, and so-called "blue" legislation is a topic by itself. For the moment let us consider merely the effect of the great mass of grotesque, defective, and ungrammatical statutes which pours forth yearly from our legislative hoppers and brings the law into ridicule and contempt. For the effect upon the mind of the citizen is the same, whether a law be absurd for one reason or another. Moreover, laws hopelessly antiquated and moribund are allowed to go unrepealed.

The city of Los Angeles boasted until recent date an ordinance prohibiting street-car conductors from shooting live game—notably jack-rabbits—from the platforms. It also forbade by law "more than one person bathing in or occupying a bathtub at the

same time.”* The writer is assured that “the purpose of this enactment was not to compel the citizens of Los Angeles to draw lots in order to see on which Saturday night each one should bathe.”

One ordinance provided that “it shall be unlawful for any person to sell any snake, lizard, chameleon, or other reptile in any street or public place in the city of Los Angeles,”† while another prohibited “wearing false whiskers, whether complete or partial.”‡

There was and still may be a Western statute regulating the passage of trains when two railroads cross at grade, as follows:

“When two trains approach each other at a crossing both shall stop and *neither shall start until the other has gone.*”

Another, equally ambiguous, in the same or a near-by State provides that “all *carpets and equipment* used in (hotel) office and sleeping-rooms, including walls and ceilings, *must be well plastered* and kept in a clean and sanitary condition at all times.”

The fact that in mediæval days animals were held responsible for their misconduct, perhaps accounts for the Kansas statute which provides that “if any stallion or jack escapes from his owner he shall be liable in damages” and for the act passed by the Washington Legislature in 1913 (C. 159) reading:

“*It shall be unlawful in this State for sheep to enter any land or lands, enclosed or unenclosed, be-*

* Ord. No. 17,666 (New Series). † Ord. No. 12,841 (New Series).

‡ Ord. No. 15,022 (New Series).

longing to or in possession of any person other than the owner of such sheep, unless by the consent of the owner of said land."

As has been pointed out by a patriotic Washingtonian, this statute "does not penalize the sheep for their unlawful act, or even require the law to be read to the sheep, which goes to show that we have, in the opinion of our legislators, an unusually intelligent, up-to-date, and law-abiding variety of sheep in this State of unparalleled resources; the presumption being that our sheep keep posted on the law, and will in future ask the consent of the owner of lands upon which they wish to graze before going thereon."

A statute of another Western State provides for the destruction of grasshoppers "*by driving them onto the prairie and setting fire to the grass after ten days' notice.*" The act is silent as to whom the notice must be given, but under the rules of statutory construction, if not of grammar, presumably it must be given to the grasshoppers—although no court has, as yet, so held.

Almost as considerate of our dumb animals would appear—from its preamble at least—to be the Pennsylvania statute of 1919 (No. 824) beginning:

"An act for the better protection of the skunk or polecat."

A Kansas statute of 1913 (L. 1913, C. 204) tears aside the arras that usually hangs before the conjugal bed-chamber, even of an inn, and provides with due, if patriarchal, solicitude that:

"No mattress on any bed in a hotel or rooming-house shall be used which is made of moss, sea-grass, excelsior, husks, or shoddy."

If such parental care on the part of a legislature is to be exercised it should be at least thorough. In 1915 (Ch. 93) the Legislature of Indiana passed one of those justly celebrated "sheet laws" so popular in various communities, to the effect that the owner of a hotel must provide each bed with sheets to be not less than ninety-nine (99) inches long and eighty-one (81) inches wide, "*such sheets to be removed from said bed and replaced by freshly laundered sheets after the departure of each guest or lodger.*"

It would appear to be perfectly legal to leave sheets on a bed indefinitely as long as the bed continues to be occupied by the same incumbent.

The Tennessee Legislature of 1913 enacted that: "It shall be unlawful *for the owner or keeper of horses, mules, cattle, sheep, goats, and hogs to run at large.*"

Legislators who can not accomplish a desired end directly often attempt to attain it by circuitous methods, the purposes of which are not always apparent. An ingenious member of the Legislature of a State in which the factories act prohibited the employment of girls under eighteen, recently proposed an amendment to the law (evidently with the idea of preventing competition from Chinese labor) that thereafter "all Chinamen" should "be deemed girls under eighteen"!

Of course the number of foolish laws actually passed is few compared with those proposed. Among these last and deserving of mention is the celebrated ordinance introduced in the Los Angeles Board of Aldermen prohibiting the eating of meat before eleven o'clock in the morning. This ingenuous idea originated in the fertile brain of a worthy citizen who reached the conclusion that the cause of most domestic unhappiness was the morning quarrel at breakfast—which in turn he believed to be due to the eating of meat too early in the day.

In Georgia a bill was introduced into the Legislature making it a ground for the annulment of a marriage if the lady had induced the proposal by "artificial means, false hair, or rouge."

Many statutes, on their face frivolous, are introduced as "riders" to bills which it is thus sought to kill by making them ridiculous or extreme. Such is the only explanation suggesting itself for the amendment offered to a recent bill introduced into the Wisconsin Legislature providing that "every proprietor of a lumber camp must supply an individual bathtub for each lumberjack in his employ."

On the other hand, many acts proposed and passed with serious intent are so drawn either through haste or carelessness that they appear almost deliberately jocular. Often this is due to a lack of sufficient definition. As a member of the bar the writer wishes that Act 239 of the Michigan Laws of 1907 might have been made clearer. It reads:

"An act to provide for the lawful taking of

suckers, mullet, dogfish, and *lawyers* from the waters of the Sturgeon River."

Frequently the subject-matter of a statute is such as to give rise to serious doubts as to the actual knowledge possessed by the legislators of what they were doing; in a word, whether under the circumstances any actual "legislative intent" were possible. Thus under the Federal statute approved August 12, 1912, Congress lightly tossed off the following regulation with respect to the "short wave" used in wireless:

"At all stations the logarithmic decrement per complete oscillation in the wave transmitted by the transmitter shall not exceed $2/10$, except when sending distress signals and messages relating thereto."

And until recently it was provided by law that:

"The circumference of a circle shall be three times its diameter."

There is a curious antipathy upon the part of legislators to repeal moribund statutes. This is due equally to the abnormal pressure put upon them to pass new ones and to their natural disinclination to make themselves responsible for any change which may possibly be for the worse. So they "pass the buck."

There are thousands of such laws that may, at any time, bob up unexpectedly and make trouble—at least once. As late as 1889 a certain New Jersey grand jury indicted one of the ladies of their acquaintance for the crime of being "a common

scold" under a statute which had never been repealed. She was saved from the ducking-stool only after considerable legal embarrassment. The writer is informed that many similarly undesirable statutes exist in that and other States.

It is probably still illegal in many States to drive or even walk for pleasure on Sunday, and criminal in most of them to hunt, fish, or indulge in simple open-air games on that day.

Naturally, where the original laws have been superseded by codes, civil and criminal, it is easier to find out what may or may not be done without fear of jail, but even the most modern codes contain many surprises in the shape of antique statutes incorporated bodily into the new.

This has recently been brought home to the New York public through an advertising scheme cleverly devised for the purpose of giving publicity to a "feature film" entitled "Outside the Law." Large signs appeared side by side throughout the city, one of which alleged:

"IF YOU PLAY CARDS ON SUNDAY YOU
ARE OUTSIDE THE LAW!"

while its companion asserted:

"DO NOT BE MISLED BY MALICIOUS PROPAGANDA!
IF YOU PLAY CARDS ON SUNDAY
YOU ARE NOT OUTSIDE THE LAW!"

The effect upon the public mind was, as intended, highly confusing; and the spectacle certainly did not tend to create respect for the law, either as a guide to conduct or an efficient instrumentality of government. One-half the readers of those signs probably wondered why there should have been any doubt about the law and concluded that if such a doubt actually existed, the lawmakers must be inefficient; while the other half doubtless accepted the assertion that it was against the law to play cards on Sunday and concluded that the lawmakers were idiots.

In point of fact, having now perhaps excited a pardonable curiosity, it is only fair to state that under the laws of New York (Penal Law, Sec. 2145) "all shooting, hunting, *playing*, horse-racing, *gaming*, or other public sports, exercises, or shows, upon the first day of the week and all noise disturbing the peace of the day are prohibited."

The reader is now at liberty to decide the much mooted card-playing question for himself. It has been held in Mississippi that the word "game" in

* Section 2145 of the Penal Law was amended in 1919 so as to read as follows, the italicized portion being new:

"All shooting, hunting, playing, horse-racing, gaming or other public sports, exercises or shows, upon the first day of the week, and all noise *unreasonably* disturbing the peace of the day are prohibited.

"*Notwithstanding the provisions of this section or of any general or local act, it shall be lawful to play baseball games on the first day of the week after two o'clock in the afternoon and to witness which an admission fee may or may not be charged, in a city, town or village, if an ordinance shall have been adopted by the common council or other legislative governing body of the city, town or village permitting such games on such day and after such hour.*"

a Sunday statute does not apply "to such private diversions as card-playing and chess-playing." (Rucker vs. State, 67 Miss., 328.) The writer is unfamiliar with any satisfactory judicial interpretation of the verb "to play." It would seem that a less ambiguous statute would be desirable for obvious reasons.

And here is the origin of the quip, "The operation was a success, but the patient died": the act passed by the General Assembly of Ohio, April 8, 1919. "Major surgery . . . shall be defined to mean the performance of those *surgical operations attended by mortality* from the use of the knife or other surgical instruments."

Probably the worst example of a "fool" law ever passed in this country is Section 413 of Chapter 67 of the Kansas Laws of 1903, relating to the operation of motor-vehicles.* It reads:

"Nothing in this section shall be construed as in any way preventing, obstructing, impeding, embarrassing, or in any other manner or form infringing upon the prerogative of any political chauffeur to run an automobibulous band-wagon at any rate he sees fit compatible with the safety of the occupants thereof; provided, however, that not less than ten nor more than twenty ropes be allowed at all times to trail behind this vehicle when in motion, in order to permit those who have been so fortunate as to escape with their political lives an opportunity to

* Passed, presumably as a joke, on April 1, 1903, but later actually incorporated into the Revised Statutes of the State!

be dragged to death. And provided further, that whenever a mangled and bleeding political corpse implores for mercy, the driver of the vehicle shall, in accordance with the provisions of this bill. 'throw out the lifeline.'"

Lawmakers are apt to be haughty men, swollen with the pride of office, intolerant of criticism, and, given to "feeling their oats." That is the only explanation of such legislative horseplay as the above. Is there any need of looking further for at least one good reason why our laws do not command greater respect?

VI

SANCTITY BY STATUTE

INTRODUCTORY

*"That bids him flout the law he makes,
That bids him make the law he flouts."*

This article was written before the passage of the Volstead Act, and what I have to say in it relates only to lawmaking in general. However, it may be of interest to the reader to know that when it appeared it was immediately hailed as a subtle attack on prohibition under the guise of a criticism of the Sunday laws. Rereading it I perceive how it might be susceptible of such a construction. However, that is the fault of the Eighteenth Amendment and not mine. Anybody who has read Freud or even one of his minor disciples knows that to stifle a natural instinct is the surest way to make trouble both for its possessor and others. That the article is worthy of a place in the definitive edition of Train's works is shown by the fact that it was reprinted in pamphlet form by the United Brewers of America, or some such organization previously interested in the manufacture and sale of alcoholic beverages, and distributed broadcast throughout the United States and Canada in spite of the violent protest of the officers and board of directors of the Association of American Rum Runners.

VI

SANCTITY BY STATUTE

It is an idiosyncrasy of us Americans to believe that we can make ourselves good by making it a crime to be bad. It is our common delusion to suppose that if anything goes wrong all we have to do is to pass a law about it to make it right. Unfortunately it makes no difference how many or what sort of laws we put on the statute books—we remain exactly what we were before. The milk in the bottle is no purer because the milkman changes the label and marks it "Certified." The leopard cannot change his spots by calling himself a lamb. No self-serving declaration of righteousness can change us by a single jot or tittle. We cannot lift ourselves by our own moral bootstraps.

This is as true of religion and health as it is of morals. We cannot intensify our faith by eloquent preambles to legislative enactments; nor can we make ourselves well by declaring it a crime to be sick. Yet we seem to be convinced that we can sanctify ourselves by passing statutes and that so long as we pronounce ourselves virtuous there shall be no more cakes and ale. The fact of the matter is that we want to appear better than we are. But we are living in a fool's paradise. The American nation, sticking its head in the sand of legislation,

is trying to fool itself into the belief that no one can see what sort of bird it is. Yet it is the same old bird—a pretty good one, no doubt—but still the same.

There is another thing about this law business that comparatively few people understand, and that is how very slight a factor—almost infinitesimal, in truth—the criminal law is in keeping the world straight. Ninety-nine per cent of all law is unwritten. Human affection and loyalty, morals, religion, chivalry, good sportsmanship, manners, etiquette—even mere taste—are vastly more important in making people behave themselves than the fear of going to jail. What people won't do for themselves they are not apt to do for the law. Just as in school you can't make children learn unless they want to, so when they are grown up you cannot make them good unless they wish to be good. People who have no consciences will not obey the law; the rest do not need it. The worst sinners have the least remorse. Murderers sleep sounder in prison than any other class of offenders. In a word, the law is at best not a very effective instrument in human progress.

And making laws is one thing; enforcing them is another. Legislation cannot be too far in advance of public opinion, else it becomes, in consequence, ineffective or tyrannical. You can drive a horse to water, but you cannot make him drink; and on the other hand you cannot quench his thirst by giving him hay.

Quoth Anacharsis to Solon: "What! Do you expect by a few writings to repress the injustice and passions of men?"

To which Solon replied: "Men take good care of those things concerning which they themselves are agreed; such shall be the nature and spirit of my laws that the citizens shall perceive their interest to be more in the observance than in the violation of them."

As Emerson said: "The wise know that foolish legislation is a rope of sand which perishes in the twisting; that the state must follow and not lead the character and progress of the citizen."

Only those laws are wise which are perceived by public opinion to be for the best interest of the citizens.

No law can be enforced that defies public opinion or is contrary to the reasonable demands of human nature.

Let us assume for illustration that our lawmakers in their wisdom should decree that thereafter all citizens instead of walking upright should go upon their hands and knees. That would be contrary to nature and presumably contrary to public opinion. To enforce that law there would be required to watch each citizen at least one policeman, who in turn, to be at all effective, would have to violate the law himself by remaining erect. Moreover, the human body isn't built that way, and if every one in fact tried to obey the law, before long he would get so tired of crawling around on all fours that he

would soon lie down and gladly starve to death. The Legislature might have prefaced the statute with some declaration to the effect that whereas everybody in the world was agreed that it was wrong to walk in a vertical position it was now therefore resolved and enacted that thereafter it should be a crime to do so; but that in itself would not change the fact that it was the natural method of locomotion or make people really regard walking on two legs as a crime.

Now, it is even harder to control people's minds than it is their bodies. It is manifestly impossible, as well as absurd, to attempt to regulate their religious beliefs or political ideas. Our Government is based on the proposition that every man shall be free to think what he will so long as this does not interfere with a similar right on the part of others. This includes the right to worship any god he sees fit. Yet most of us are inclined to forget that, save as a matter of numbers, we are not officially a Christian nation any more than we are Mohammedan or Hebrew. With us religion and the state have no connection whatever. As long ago as 1796 in our treaty with Tripoli the National Government declared that "the United States of America is not, in any sense, founded on the Christian religion." This may surprise many of our readers; but it is nevertheless a fact which cannot be denied. And laws intended to enforce upon the nation, either directly or indirectly, the tenets or conventions of any religious faith are just as for-

eign to our institutions as if they were designed to enhance the glory of Buddha, the "Bab," or the "Omnipotent Oom."

This was evidently quite overlooked by the Western solon who recently proposed a bill in a certain legislature making it a crime to violate any one of the Ten Commandments, and beginning:

"Whoso shall have another god shall be fined one hundred dollars."

The bill did not pass, but in view of other legislative monstrosities dignifying the same session, it is surprising that it did not. Had the legislator in question attempted to define the god he was referring to he might perhaps have realized himself the grotesque character of his proposed statute. The final paragraph of his bill provided for the sin of covetousness:

"Whoso shall covet his neighbor's house, his wife, his man servant, his maid servant, his ox, or his ass, shall be fined according to the enormity of the offense."

One wonders how our friend expected to enforce this and other provisions of the Decalogue. Did he propose to have a police force trained to detect the telltale symptoms of coveting? Did he assume that the coveter goes through the same facial contortions as the gloating villain of the movies? Or did he just run in "Art. X" for good measure?

While it is a sin to covet, although it would require an all-seeing eye to detect the sinners, the mere fact that it is prohibited in one of the laws

brought down by Moses from Mount Sinai is no reason whatever for enacting the commandment as a statute for one of these United States—any more than one of the injunctions of Mohammed taken at random from the Koran. A sin is something which violates our duty toward God and which our conscience tells us to be morally wrong; a crime is an act or omission which works an injury to our fellows, which they collectively desire to prevent. A legal crime may or may not be a sin; a sin may or not be a legal crime. Theoretically and practically, they are different things and must be dealt with in different ways, by the governmental authorities on the one hand, and by the church, or whatever represents religion to us, on the other. It would be against public policy to confuse them, and to make all sins punishable by prison sentences would not only be impossible, but, if it were possible, would result in social chaos. If coveting involves an injury to the public which the public wishes to prevent, and there is any reasonable ground for supposing that a law against it could be effectively enforced and the coveters sent to jail, then and then only should it be made a crime. Otherwise it should be left to our private consciences.

For you cannot make people regard as sinful that which their consciences tell them is not, by making it illegal. You may possibly succeed for a time in preventing the forbidden acts, but in the long run an intolerant law arouses such antagonism that it will almost inevitably make lawbreakers out of

even good citizens. Desire to do the thing prohibited grows with repression—until the social boiler explodes. People who think that motoring on Sunday is an innocent and reasonable form of recreation will not be led to regard it as morally reprehensible because the Legislature makes it a misdemeanor or even a felony. Much more effective is the method adopted in many places of posting a sign just outside the door of the church reading: "Automobilists, have you been to church to-day? If not, why not park and come in? Service is going on. You are welcome!"

If the old colonial "blue laws" of Virginia, New York, Connecticut, and Massachusetts ever were rigidly enforced, which is doubtful, it was only because they represented the consensus of public opinion that the acts prohibited were wrong. In point of fact, these ancient laws flew in the face of the later principles of religious toleration that became the corner-stone of our institutions, for while the early colonists had emigrated from England to secure religious liberty, they did not come here to gain it for all, but only for themselves. Their laws were as intolerant as those religious tenets by virtue of which they regarded themselves as justified in scourging Quakers, Adamites, and heretics, and putting witches to death.

The so-called "blue laws" are merely the adoption by the first authorities of the New Haven and other colonies of the Mosaic code as their principles of law and government. As the Reverend Mr.

Davenport, addressing those met to consider the nature of their institutions, said, with which they all agreed:

“The Scriptures do hold forth a perfect rule for the direction and government of all men and all duties which they are to perform to God and men, as well in the government of families and commonwealth as in the church.”

If they really believed it sinful to “read common prayer, keep Christmas or saints’ days, make minced pies, dance, play cards, or play any instrument of music except the drum, trumpet, or jew’s-harp,” to cross the river, run, walk in one’s garden, “travel, cook victuals, make beds, sweep house, cut hair, shave,” or to kiss one’s wife, husband, or child upon the Sabbath (as the Reverend Samuel Peters said was the case prior to 1650), or if they sincerely regarded as worthy of death any child over sixteen years of age who should curse his father or mother, or any son above that age who was “stubborn and rebellious” and would not “obey their voice and chastisement,” and embodied their theories in their laws, perhaps those laws may for a time have been effective.

Certainly no one in New England in those days feared capital punishment lest he should “have or worship any other god but the Lord God,” for no one wanted any other god. Moreover, it is quite likely that then, even as now, these laws represented a creed rather than a code. It is more than possible that the early colonists kissed their wives on Sun-

day, and probably committed other and even more reprehensible offenses, without suffering severely for it. The mere fact that the law provided that a certain punishment might be inflicted for a certain offense does not by any means prove that such punishment was actually imposed; any more than it means that we New Yorkers beat our children and kitchenmaids because under our laws homicide until recently was excusable when "lawfully correcting a child or servant." (Sec. 1054 Penal Law.)

Nowhere in the world during the last one hundred and fifty years has there been so much talk about liberty as in the United States, yet paradoxically enough nowhere in the world have so many laws been enacted by the majority to curtail the rights of the minority as in our own legislatures. This, to be sure, is usually not because the majority wish to "put anything over" on the minority, but because it thinks it knows what is good for the minority a great deal better than the minority does itself. "To-day," said one of the wisest members of our judiciary, "according to the notion of many, if not most, liberty is the right of part of the people to compel the other part to do what the first part thinks the latter ought to do for its own benefit."

As Buckle points out in his "Civilization": "The love of exercising power has been found to be so universal that no class of men who have possessed authority have been able to avoid abusing it. . . . All that is done [by the laws] is to afford the oppor-

tunity of progress; the progress itself must depend on other matters. . . .”

Not only is it the unanimous experience of mankind that legislation concerning matters affecting conscience and religion is not only ill-advised, but unenforceable, but also that laws which seek unreasonably to regulate the details of personal conduct, especially those which have not the overwhelming support of public opinion, have generally been found impossible of enforcement. Honest laws which are ineffective because they set an impossible standard of human conduct, no less than hypocritical laws which are not intended to be obeyed, equally bring the law into disrepute. The spectacle of a law openly flouted is highly dangerous; the knowledge of a law universally violated poisons the whole moral atmosphere of a community. To-day it is an accepted doctrine that just as we have the right to worship any god we please in any way we please so long as it does not interfere with other people, so we have the same general right to lead our own private lives without interference on the part of others, whether these be officious individuals or official lawmakers whose interference takes the form of legislation.

Whether or not these much-ridiculed “blue laws,” promulgated in a society where eternal damnation was an ever-present expectation, were genuine or apocryphal, honored in the breach or the observance, they belonged to a community founded upon the English theory that the church was part of the

state and that religion was a proper subject for governmental control and supervision. When the colonies separated from Great Britain that theory was one of those expressly rejected by the framers of the Constitution. That is the psychological reason why the so-called "Sabbatarian movement" has aroused in this country so much sincere opposition—the belief that its animating purpose is somehow religious, rather than what its spokesmen claim for it—merely an improvement in social economics.

There is a clear opportunity for a well-grounded difference of opinion as to the advisability of many of the proposed new Sunday laws. Certainly everybody is entitled to his day of rest, and statutes introduced with the object of securing it for those who otherwise would not have one, start with the presumption in their favor. The actor has so far kept his Sabbath, if not holy, at any rate personal. But that is because he has insisted upon it himself. Whether the same reason exists in the case of the ball-player, drug clerk, motion-picture operator, bath-house attendant, etc., as the Lord's Day Alliance insists, is another question, particularly if those involved do not want it.

The Reverend Harry L. Bowlby is quoted as saying that the Alliance is not in favor of "blue laws," that it is not against recreation, not trying "to take the sun out of Sunday," and that its only object is to make Sunday a real day of rest. To do this, he concedes, the organization holds that all motors should be placed at the service of those who wish

to go to church and could not otherwise do so, favors the abolition of the Sunday newspaper and all forms of Sunday amusement which in any way involve human labor no matter how many people are thereby deprived of recreation or how much human labor is involved. Its programme is admittedly extreme, but it would not excite nearly so much antagonism were it not for the fact that while the Alliance protests that its object is social, the public declarations of its agents tend to show that the driving force behind it is, to a large extent, the promulgation of a religious doctrine. The Alliance alleges that the "commercial interests" have conspired to do away with the old Sunday laws, that the country has been "robbed of its holy day," and that (although Christ said that the "Sabbath was made for man") "one day in seven belongs to God."

"It is true," Doctor Bowlby says, "that conditions have changed to such a degree as to make our old-time Sunday seem to some impossible. It has slipped out of our lives, and it cannot be brought back by a Federal amendment. But these new conditions did not annul the law of God. . . . America is paying the penalty to-day for the loss of the American Sabbath, regardless of how or why we came to lose it."

The Sunday movement has attained a considerable following by reason of the sound economic reasons in favor of its more moderate proposals, but the moment it urges a purely religious argument it necessarily weakens its position.

The old Puritan Sabbath, in which Rover could be reproved for barking "because it was Sunday," was not legislated out of existence by the "commercial interests," but died a natural death because, wisely or unwisely, rightly or wrongly, the American people as a whole wanted freedom to worship or not to worship as the case might be. It is to-day almost as incredible to imagine the recrudescence of the old New England Sabbath, that offspring of religious persecution and Levitical law, as a statute which should require everybody to attend some particular church. Each proposed Sunday law must stand on its own feet and not upon religious dogma, however much the latter may individually appeal to us.

For historically the idea that our Sunday and the Jewish Sabbath are one and the same thing, or that there attaches a peculiar sanctity to the day itself through scriptural and early ecclesiastical teaching, is without foundation. So far from being an integral part of the Christian faith, the idea of ultra-strict Sunday observance is barely three hundred years old.

In early times all the days of the week were esteemed alike, and Sunday was merely a "holy day" or "holiday" for rest and recreation. Calvin himself played bowls on Sunday at Geneva. The actual basis of the austere Sabbath lies in the fact that as religious services were celebrated on Sunday, noise, games, markets, fairs, or competing entertainments tended to interrupt the ceremonies and

deplete the attendance. Thus gradually laws were passed to prevent the uproar of crowds assembled for amusement and the outcry of hawkers during church time, but not because there was anything intrinsically improper or offensive in the acts themselves as being done on Sunday.

In old times parliament sat on Sunday, and it passed acts on that day in the years 1278 and 1305. As late as 1676 contracts and bargains made on Sunday were of the same binding force as if made on any other day. In 1448 an act was passed prohibiting the larger fairs and markets on Sundays and the "solemn feasts of the year," but it was not because buying and selling on Sunday were regarded as wrong. It was because Sunday was a feast-day set apart for religious ceremonies, which the doing of other things might interfere with. To-day one of the chief arguments used against Sunday baseball and Sunday movies is that they tend to keep people away from church, but a similar argument, it would seem, might lead to a statute requiring people to remain indoors when not at divine worship.

Sabbatarianism, as we use the term, was unknown prior to 1595, when it was conceived by the Reverend Doctor Nicholas Bound, of Norton, Suffolk, England, and promulgated in a book entitled "*Sabbathum Veteris et Novi Testamenti*; or, *The True Doctrine of the Sabbath*." Until this publication the idea of giving Sunday the name and character of the Jewish Sabbath had not occurred to anybody. His theory was that although Sunday was

not divinely appointed as the Sabbath, the obligation to observe *a* Sabbath was divinely ordained, and as the Christian world had selected Sunday as a holy day it must be observed like the Jewish Sabbath.

The movement spread until by 1618 Sunday had become such a day of gloom that James I issued his famous "Book of Sports" to cheer up his depressed subjects. It declared that dancing, archery, leaping, vaulting, May games, and morris-dances were lawful, and honest mirth not to be prohibited after evening service. Charles I in 1633 renewed the edict of 1618 and endeavored to stay the Sabbatarian movement, but in vain, and from that time on the English became stricter and stricter in Sunday observance. The colonies naturally took their cue from the old country.

In 1676 came the most famous of all Sunday statutes, the "Lord's Day Act" of 29 Carolus II, 7, forbidding all work and business on Sunday, "works of necessity and charity excepted." This became the basis of all Sunday legislation in the United States. It was the original "blue law," and stood practically unamended until it had long ceased to have any effect in this country.

Yet, in an era of the widest religious latitude and general broad-mindedness, it is still a crime in New York State to "play" on Sunday, whatever that may mean.

These archaic statutes are constantly arising like ghosts from the legal past to make trouble for our

solemn, if well intentioned, judiciary. Sunday laws—most of them deader than Sardanapalus—exist in every State, and we have contradictory judicial opinions in some jurisdictions to the effect that one who is technically in violation of a Sunday law can secure no recovery for the negligent act of another, and in others that where two persons are jointly engaged in violating the Sunday law and one is injured by the other the defendant cannot set up the contributory negligence of the plaintiff as a defense.

It will probably take another half century to get rid of the contradictions, paradoxes, and absurdities still surviving in the law for which Charles II's "Lord's Day Act" is responsible.

Since the passage of the Eighteenth Amendment there has been a marked revival of interest in what is known as "sumptuary" legislation; that is, the passage of laws designed to regulate luxury, particularly what we shall eat and drink and wherewithal we shall be clothed.

It is a curious phenomenon that a nation which should have graduated so successfully from the age of buncombe, which has ripped the façade off the whited sepulchre of business and politics, should continue to delude itself into thinking that sanctity is a matter of statute.

There never was a period in our history when public assemblies passed so many resolutions as the present. If anything goes wrong—no matter what—instantly half a dozen solemn bodies resolve

that it shall be righted. They may even appoint a committee "of distinguished names"—well described—to see to it. But that is usually the end of the matter. The enthusiasm of the moment is just sufficient to produce the resolution, which is still-born. Spasms of virtue—actual or fictitious—seize even the most abandoned legislators, who periodically seek by statute to enforce the Golden Rule and the Decalogue, and to bring about the millennium, without result save to add to the gaiety of the nation and to publish our hypocrisies to a carping world.

Paternalism has been fairly weighed in the balance and found wanting. For those who believe that the State ought to undertake the general task of social regeneration the Greek experiment—which had all the advantage of a partnership with an accepted national religion yet nevertheless failed—is worth looking into.

We cannot make ourselves good or bad, sick or well, religious or irreligious, high- or low-minded, by legislation. Our laws should reflect our spiritual progress, not seek to advertise an assumed virtue. Neither can we satisfy our individual instinct for freedom of action, upon which our progress depends, by dictating to our fellow citizens how they shall dress, when they shall go to bed, how they shall amuse themselves, and concerning the other details of their private lives. It is still true that "he who is governed least is governed best."

VII

CRIMINAL LAW AND COMMON SENSE

INTRODUCTORY

“And the wildest dreams of Kew are the facts of Khatmandhu,
And the crimes of Clapham chaste in Martaban.”

The vices of one generation may be the virtues of another, and what was regarded as anathema in 1840 be held laudable in 1920. There is an historical example of this in the author's own family. His father, who was born in the year 1818, having graduated from Brown University in 1837, attended for a time the Harvard Law School and then returned to practise his profession in the town of his nativity—Framingham Centre, Massachusetts—where his father was the pastor of the Baptist Church. Having, for religious, social or, possibly, business reasons, thought fit to apply for membership in his father's congregation, he received the following letter :

Framingham

May 4, 1841.

Dear Brother in Christ :

At our last regular church meeting, the Church, not from any ill will or ill wish towards you, but from a sense of duty, and your spiritual good, authorized their clerk to write you, and state that common report says, when you were residing in Milford, Mass., you was the prime mover of a resolution for a ball, attended the same, and acted as a manager. This report comes well substantiated. We have reason to believe that your general character did not give much, if any,

evidence of Piety. The Church wish you well and that you may be directed into the path of duty.

Yours,

F. GAY,
Clerk.

They desire an answer immediately.

There is no record in the Train family Bible of what his answer was.

VII

CRIMINAL LAW AND COMMON SENSE

"If the law supposes that," said Mr. Bumble, "the law is a ass, a idiot."

—*Oliver Twist*, chapter LI.

THE legal profession has always been the butt of laugh-makers ever since Shakespeare spoke of "old father antic the law"—and doubtless long before. Animadversions upon the administration of criminal justice in America have become a habit. Public speakers, in default of ideas upon other subjects, can always successfully lament the inefficacy of our procedure; our tenderness for the rights of the criminal; the ease with which convictions are reversed on technical grounds; our delays on appeal; and the lawlessness of juries, as contrasted with what we are led to believe is the swiftness and accuracy of English justice.

One would assume from reading the annual proceedings of our State Bar Associations that the greatest of all present evils was the ease with which vice triumphed over virtue at the bar of justice. It is easy to create this impression, by using a few choice selections from our heritage of weird opinions and crazy verdicts. There is no dearth of ammunition for the attack. But, conceding that many abuses exist, a lot of this talk is "bunk."

The criminal law of England is administered with a pomp and circumstance that may perhaps unduly impress us. Undoubtedly they do some things over there better than we do them here. But most Americans, certainly if they were in the dock, would resent the conscious superiority of English court officials. The Declaration of Independence qualifies our respect for the big wig and the red gown. We should feel that the judge arrogated to himself rather too much of the majesty of the law.

As Jeremy Bentham says: "Confirmation of arbitrary power in the hands of the judge: the jury serving as a stalking horse. Incapable of judging for themselves, conscious of their own incapacity, juries become helpless, and do as they are bid. How should they do otherwise?"

"They know not what is done; they know not how to help themselves. If the court likes the verdict it stands; if not, it is got rid of."

When Doctor Crippen was brought to the bar for sentence, the judge who had tried him ordered him to be hanged by the neck until he was dead on Thursday, the 28th of June. But the sheriff, who was present to take over the custody of the prisoner, spoke up:

"Beg pardon, your Ludship, it would be more convenient if we could hang him on the 18th."

"Oh, very well," said his Lordship, "make it the 18th then."

In a certain sense they do not have a jury system in England: they have a judge system. In our coun-

try we do not permit judges to interfere. Here a man is tried by a jury of his peers; over there he is convicted by a lord, and his case on appeal is disposed of by three glorious old flamingos in white wigs and red gowns, in whose presence he feels the immensity of his own insignificance and rather an honor to be considered at all. I have been told that where special commissions are issued to King's counsel to act as judges in criminal cases, the prisoners on those circuits object strongly to not being tried by what they call a "red judge."

It is an inheritance of the feudal attitude. I once prosecuted an Italian for murder, who on his being arraigned for sentence was asked, according to custom, if he had anything to say.

"Nothing," he answered, through the interpreter, "except that I beg to convey to the judge and jury my thanks for their attention and to apologize for having taken up so much of their time."

Respect for the law, for the crown, and for the king's peace is inborn in every English subject, whereas in America we have a justifiably low opinion of legislators and of many of our laws.

There is a great deal of nonsense talked and written about the administration of criminal justice. What do we mean by crime? What do we expect of criminal justice, anyway? And do we deserve anything better than we get? The limitations of criminal justice to-day are to be found rather in the way it is administered than in the system itself. We pride ourselves upon the fact that ours is a gov-

ernment of laws and not of men. But the fact remains that all laws, however perfect, must in the end be administered by imperfect men. There is no such thing as a government of laws and not of men. You may have a government *more* of laws and *less* of men, or vice versa. Sooner or later you come to a *man*—in the White House, or on the woolsack, at a desk, or in a blue coat and brass buttons—that is, to the man behind the law.

The criminal law could be administered quite satisfactorily under a benevolent autocracy so long as the autocrat was sufficiently benevolent and wise. The principles of Magna Charta and the jury system are only better than the “off with his head” method of an Oriental potentate so long as they work better.

Crime is only a manifestation of the individual's unwillingness to bow to the will of society. Infractions of good taste and of manners, civil wrongs, sins, crimes—are in essence one and the same, differing only in degree. The man who goes out to dinner without a collar violates the laws of social usage; if he entirely disrobes and walks the streets he commits a crime. It simply depends on how many clothes he has on what sort of offense he commits. From this point of view the man who is not a gentleman is in a sense a criminal; and any disregard of the prevailing sentiment in a community has a tinge of criminality. In other words, a criminal is an egotist who prefers his own way to that of his fellows.

We have various ways in dealing with these out-

laws. The man who violates our ideas of good taste or good manners is sent to Coventry; the man who does us a wrong is mulcted in damages; the sinner is ridden out of town on a rail, held under the town pump, or the church takes a hand and threatens him with the hereafter; but if he crosses a certain arbitrary line we arrest him and lock him up—either from public spirit or for our own private ends.

Fundamentally there is only an arbitrary distinction between wrongs, sins, and crime. Morally, ethically, politically, the mere sinner is just as dangerous to the community as the criminal. The meanest and most detestable of men, beside whom an honest murderer is a sympathetic human being, may never violate a criminal statute.

There is no need of elaborating this proposition. The business crook who steers just outside the line of criminality may ruin a hundred homes and be the indirect cause of untold suffering and sorrow. The complainant in a criminal case is not infrequently quite as bad as, if not worse than, the defendant. I rather sympathize with Bernard Shaw when he says that "so long as we have prisons it makes little difference who occupy the cells." And I have shaken hands with many a criminal who was a criminal from praiseworthy though mistaken motives—that is to say, who had assumed to take the law into his own hands and punish an offender for fear that the law would fail to do it for him or because there was no law to cover the case. The only suggestion I would make to such is that if a man elects to pur-

sue this course he should be ready to take the consequences like a gentleman and a sportsman.

The main difference between mean or crooked people is that some are in, and some are out, of jail.

In order then to determine whether the administration of criminal justice is effective or ineffective you must first decide what people you want to send to jail. Having settled this important question, the system will appear successful or not in accordance with the extent to which it accomplishes your purpose.

Perhaps it would be easier to select the people you do *not* wish to send to jail. We have got to admit at the outset that we cannot reform the world by sending people to jail. We can't even reform, in that way, the people we send to jail. The real problems of criminal law only begin when the so-called administration of justice ends; that is, with the final commitment of the prisoner at the bar. We have not solved those problems and it is unlikely that we shall solve them for some time yet. But a mother cannot spend all her time spanking her children, for if she did, the housework would remain undone, and the dinner would not be cooked. It is obvious that on general principles the fewer people we send to jail the better, so long as the moral health of society is preserved.

Now the mere sentiment of the community is quite capable in itself of dealing with trifling offenses against justice. The rules of etiquette and manners,

devised for "the purpose of keeping fools at a distance," are reasonably adapted to enforcing the dictates of good taste and to dealing with minor offenses against our ideas of propriety. The collarless man will, in all probability, go without his collar but once. Society is quite ruthless in this respect. And although customs vary in different circles, and whereas in some places it would be an infraction of good taste to wear any clothes at all, nevertheless these circles intersect so seldom that the variations in their codes do not prevent the enforcement of their edicts.

So it is with a majority of mere civil wrongs, many of which arise from accidental causes and from ignorance, and with a considerable proportion of what are known as sins, which only indirectly affect the community at large, and which bring their own retribution upon the perpetrator. Here religion and the civil law are sufficiently effective. The human family is very much like any other family, and stringent methods of enforcing morality are undesirable where other means will suffice. It is only common sense, therefore, that the criminal law should be limited in its scope, but that where it is invoked it should be reasonably certain and sufficiently drastic to accomplish its purpose. The criminal law is not a substitute for religion.

It goes without saying that rough people must be dealt with in a rough way. If we could change the natures of thugs and housebreakers through the influence of orchestral music, public concerts would

undoubtedly be the most effective means of bringing lawbreakers into harmony with society. But there are certain classes of criminals whose skins are too thick and whose heads are too hard to be handled in any but the old-fashioned way.

Originally the criminal law made no attempt to deal with other than crimes of violence, and essentially that is its chief business even at the present time. The public peace must be preserved. Nobody has any particular quarrel with the administration of justice so far as the prevention of crude crime is concerned. The criticism and dissatisfaction begin with what is called the failure of the criminal law to deal with crimes against property.

We hear a great deal at the present time about the inability of the criminal law to punish financial dishonesty. They say that while it is easy enough to lock up a man who steals a loaf of bread it is exceedingly difficult to send to jail a man guilty of a commercial fraud which does not flagrantly transgress some penal statute; that the big banker or retailer is more of a criminal than the little thief. The flaw in the proposition, however, is the obvious one that they are confusing moral obliquity and sin with crime. The banker is worse in the eyes of God and perhaps in the eyes of the citizen, but as a matter of fact it may be much better for society as a whole, swiftly to punish larceny *vi et armis*, which is calculated to cause an immediate breach of the peace, than to expend large amounts of the public funds and of the time of highly paid public servants

in unravelling complicated situations where some phases of the statutes protecting property may have been violated, or where the ingenuity of the prosecutor may make them appear to have been transgressed. If it took six months to prosecute a man guilty of an ordinary petty larceny we would be obliged to adopt some entirely different method. In other words, inherent to this system as to any other system are obvious limitations.

Besides it is only common sense that juries will not enforce laws with which they are out of sympathy or which represent a *higher state of morality than that on which the juryman conducts his own affairs*. The multitude of criminal statutes yearly enacted only hamper the administration of the criminal law. They do not enlarge its scope, because the mere statement by the Legislature that an act shall be a crime is only an empty form if nobody is ever punished for doing it. A countless avalanche of *mala prohibita* simply clogs the wheels of justice and involves endless trouble and confusion.

The pages of the New York Code abound in evidences of legislative asininity. We have, for example, a statute which makes it a misdemeanor for a person to pawn property which he has borrowed from the owner. Since our code was enacted it always has been larceny to pawn property borrowed of another. I suppose that some assemblyman from the rural districts loaned the family watch to a friend who was going to the great city, and failed to get it back, it having proved a convenient method of rais-

ing money on the Great White Way. Therefore, full of righteous indignation and ignorance, he proceeded to make a misdemeanor that which was already a felony. At the present time there is no final judicial determination in New York as to what degree of crime a person is guilty of who hypothecates borrowed property.

The same situation exists with us where a dishonest merchant induces a bank to discount his notes on the strength of false statements as to his financial condition, and then draws against the credit thus secured. In 1912 somebody secured the passage of a bill making it a misdemeanor to procure credit by means of a false financial statement, although up to that time it had been larceny under the code. It is now doubtful whether a man who procures money by false pretenses as to his financial condition can any longer be guilty of larceny. A little study in the first instance might have avoided this unfortunate result.

That such statutes are passed is due to the hurry and carelessness with which bills are introduced into the Legislature, and the disinclination of judges, prosecutors, and members of the bar to give the time necessary to a conscientious preliminary investigation of them. The absence of a system of parliamentary barristers such as they have in England, under which it is the business of trained men to study all proposed legislation, makes much of our law fantastic. An ounce of prevention in criminal legislation may be worth several tons of legal

opinions written in connection with a statute which should never have come into existence.

Widely contrasted with the English system, where the judge is the most important factor at a criminal trial, is that existing in certain jurisdictions of our own country, which practically strips the judge of any personal part in the proceedings, permits him only to rule on written instructions, and leaves the law as well as the facts to the jury. Upon the practical working of this I am in no position to judge, but I cannot believe that the results will compare favorably with those achieved in jurisdictions where the juror is obliged to follow the instructions of the judge as to the law and is permitted only to pass upon the facts. I believe that the judge should be permitted to address the jury in his own language and impress upon them their solemn obligation to do justice between The People and the defendant.

I am convinced that juries in criminal cases are ill adapted to achieve justice unless they are controlled and directed by a judge who brings a trained intelligence to assist them in interpreting the law and applying it to the issues raised. This is peculiarly true in code jurisdictions where it is necessary that comprehensive and complicated statutes should be analyzed and interpreted by the jury.

I see little justification so far as our court proceedings are concerned for the popular belief that the administration of justice in America is conducted more in the interests of the criminal than of the community. The oft quoted remark of a well

known jurist to the effect that we are "no longer confronted by the difficulty of protecting the innocent but of convicting the guilty" is not borne out by my experience. It may be true in the general sense that the doctrine against self-crimination prevents our securing from many defendants the evidence necessary to indict them. I do not think there is any particular difficulty in convicting the guilty when we have the evidence. An indicted defendant in reality comes to the bar with the odds all against him. Juries pay very little attention to the legal fictions of the "presumption of innocence" or the "reasonable doubt." The greatest fiction of all is that juries can be governed by fictions. In fact, one sometimes is tempted to conclude that the jury system is successful in inverse ratio to the extent that it acts according to the technical doctrines and theories of the law.

This is true of the requirement that the jury must not draw any inference unfavorable to the prisoner owing to his failure to take the stand. You cannot put twelve common sense citizens in a jury-box and expect them to act in accordance with doctrines of law which run counter to human experience. So far as there is any presumption at all concerning the defendant it is that he is guilty, and, unless the case against him is unusually weak, a defendant who does not take the stand is doomed. Although the law requires that no reference shall be made by the prosecutor to the failure of the defendant to testify, there is nothing to prevent the latter's indirectly

calling attention to the fact by pointing out what features of the evidence might have been denied, but stand "uncontradicted."

So it is with the rules of evidence. Jurymen have, time and again, told me that objections raised by the defense to questions which to their minds seemed charged with significance, were matters which they considered seriously in determining the defendant's innocence or guilt. You cannot change human nature. You cannot create an arbitrary body of rules "eminently adapted to the exclusion of truth," and attempt thereby to control the natural course of the human mind.

The administration of justice in America differs in effect very little from the administration of justice in foreign countries where they are supposed to proceed on an entirely different theory; that of the defendant's guilt. I had the privilege of attending the trial of the Neapolitan Camorra at Viterbo, after having heard much of the laxity of foreign courts of justice, and how they admitted hearsay evidence and called upon the defendant to prove his innocence. So far as I was able to observe the procedure at Viterbo was conducted substantially as it would have been in America. It is true that the witnesses were permitted to give hearsay evidence and state their own conclusions; and theoretically the defendant may have been presumed guilty; but I understood the rule to be that, in spite of this fact, the prosecution was obliged to sustain the burden of proof, which is practically all that a jury re-

quires of a prosecutor in America, and inasmuch as the judge examined most of the witnesses and permitted practically no interruption on the part of the advocates, I came away with the feeling that the trial was being conducted with quite as much celerity as if it had taken place in New York, where practically every question would have been met by an objection on the part of the defendant's counsel.

In a word, human nature is about the same the world over.

The delays in criminal procedure were, and still are, a reflection on our system, but agitation in this regard during the last few years has had a pronounced effect. There is usually much less delay in getting to trial in criminal cases to-day than in civil cases, and no greater delay on appeal. This was not so in the old days. What delay on appeal there is nowadays is due chiefly to the reluctance of attorneys to prepare cases and argue them without adequate remuneration. A defendant has usually been sucked dry by the time he has been convicted, and the lawyer wants time in which the defendant or his friends can raise money for a "refresher."

Many criminal appeals are disposed of with praiseworthy celerity. Unfortunately, as a rule, the most conspicuous cases are those where the ablest counsel are engaged, the points raised most numerous, and delay most frequent. Moreover, defendants convicted of murder in the first degree are naturally in no particular hurry to have their convictions affirmed.

But if district attorneys prepared and tried their cases with care, and those cases were prosecuted only before judges qualified by experience and training to preside at criminal trials, and there were fewer fool statutes upon the books, the matter of criminal appeals would take care of itself.

So far as New York State is concerned, there is little fault to be found with the attitude of the appellate courts toward technical errors. The Code of Criminal Procedure provides:

"After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

Similar statutes have been adopted in many of the States, and the tendency of the last ten years has been strongly against reversals on technical grounds. Common sense is not confined to those who scoff at the absurdities of criminal procedure. The world moves. Times change. And the old zest for picking flaws in indictments and trial records is dying out.

Our object should be to get a quick final determination and prevent that postponement of deserved punishment which gives color to the claim that there is one law for the rich and another for the poor.

Of course there isn't one law for the rich and another for the poor. They are both tried under the same law. With us the rich man has less chance before a jury than a poor man. Some years ago the

newspapers and magazines succeeded in convincing the public that to be a rich man was almost of necessity to be a criminal, that one couldn't make a lot of money honestly, and that most men prominent in business or holding public office were crooks or thieves. Enough of this idea lingers to make rich defendants highly uncomfortable, and undoubtedly affects the actions of some juries. There is a latent prejudice lurking under the skin of the American juror against policemen, politicians, and rich men accused of crime. The juror has read all about them and knows the tricks they are up to. So that at the bar the rich man gets the worst end of it. It is only afterward that he has the advantage. He can buy delay—although he can't buy the jury.

The common sense of the matter is that often the poor man can't afford to take his case up on appeal, while the rich man can. Thus you might say that, in effect, the very poor man had no appeal. "Justice" is a commodity to this extent. Even if appeals do them little good, criminals ought to get exactly the same handling—rich or poor. To accomplish this the rich man's rights should be limited until they are actually no greater than the poor man's. This could be done by allowing a direct appeal to a Court of Criminal Appeal, where the matter would end. If malefactors of great wealth had a present vision of themselves breaking stone and drinking barley soup at the end of next week instead of at the end of five years, it would make a vast difference.

Another inherent advantage of the rich male-

factor is that he can often buy off the complaining witness whom he has injured or can make such generous restitution that there is no vindictive demand for his prosecution. That is not a limitation of the criminal law, but of human nature.

Another favorite subject for ridicule is the involved language in which criminal pleadings are often drawn. Of course it is as easy to cull out antique phraseology from some murder or larceny indictment and hold it up to scorn as to pounce upon some ancient technicality by virtue of which some prehistoric horse-thief on the fringes of civilization escaped his deserts.

I have no sympathy with the hide-bound practice of following ancient forms in drawing criminal indictments. But however involved the language, it is, after all, a trifling matter. It hurts nobody, and it is often safer to follow an ancient form than to hazard a reversal. To attack the administration of criminal justice by scoffing at the form of indictments is like sneering at a man because he wears an old hat.

While it is only common sense to simplify legal language, it is equally common sense not to simplify it at the expense of safety and accuracy.

Of course Bentham did not miss any opportunity to jeer at indictments:

"A man was murdered by being knocked on the head and thrown overboard: whether dead or not when thrown overboard, is uncertain. Two counts: one, that the man was knocked on the head, and

died of the blow; the other that the man, the same man, was, at the same time and place, thrown overboard, and died of the drowning. Here was the same man killed twice over: and this for the better information of the supposed murderer, that he might the more clearly understand the charges he had to defend himself against. Had the fact been truly stated, the murderer would have been acquitted. This case occurred not much more than twenty years ago. The indictment stood the scrutiny of the twelve judges."

That is amusing, but would Bentham have the murderer go free entirely unless the pleader could, then and there, finally determine the cause of death? Or is his criticism merely directed to the fact that the crime is alleged in counts? That, surely, is a picayune matter. To-day we have abandoned separate counts and charge all the acts attributed to the defendant in but one, alleging that as a result of the aggregate injuries the victim died. This probably would please Bentham better.

The greatest obstacle to the administration of criminal justice is the unlimited license permitted in reporting criminal trials. Of course the chief object of the press is not to convey an accurate idea of the merits of either side. To be judicial, at least in newspaper work, is to be wasteful of opportunity. The paper must take sides violently—make a row—start something. Then it will sell.

The newspapers annihilate the rules of evidence, publish *ex parte* statements and unfounded rumors,

and print for the benefit of the jury testimony that is not admissible at the trial. They excite the readers' animosity either against the prisoner or his victim. Public opinion, created and controlled by the press, directly or indirectly affects the verdict of the jury. It is stronger than the judge upon the bench. In Atlanta the newspapers convicted Leo Frank months before his trial. Not infrequently, on the other hand, while the editorial page is lamenting the prevalence of homicide, the front columns are bristling with sensational accounts of the homecoming of the injured husband, the heart-breaking confession of the erring wife, and the sneering nonchalance of the seducer, until a public sentiment is created which, outwardly deprecating the invocation of the unwritten law, secretly avows that it would have done the same thing in the prisoner's place. This antecedent public sentiment is stimulated from day to day, until it has unconsciously permeated every corner of the community. The jurymen will swear that he is unaffected by what he has read, but unknown to himself there are already tiny furrows in his brain along which the appeal of the defense will run.

In view of this deliberate perversion of truth and morals, the mendacities of a hard-put defendant's counsel seem innocent indeed. It is not within the rail of the court room but within the pages of these sensational journals that justice is made a farce. The phrase "contempt of court" has practically ceased to have any significance whatever. The front

pages teem with caricatures of the judge upon the bench, and of the individual jurors, exaggerated heads upon impossible bodies, of the lawyers ranting and bellowing, juxtaposed with sketches of the defendant praying beside his prison cot or firing the fatal shot in obedience to a message borne by an angel from on high. Under our present system there are three factors in the administration of justice—the judge, the jury, and the newspapers. And the last is often the most important.

It is due to the yellow press that the impression exists that criminal trials are more or less of a farce and are the scenes of disorder and buffoonery. It is also due to the yellow press that jurymen feel justified in disregarding their oaths at what they are led to believe is the public demand. It is common sense that this interference with justice must cease.

So far as there is any sentimentality about criminals it is largely due to the newspapers. Such sentimentality is supposed to exist, although personally I have seen little evidence of it. If an old maid sends violets or writes a letter to a young thief in the Tombs, the newspapers picture his cell as a florist's shop. But very few flowers get inside prison walls. The egotists who write letters on all occasions include the criminals among their correspondents, but as they write to everybody that fact has no significance. On the contrary, there is, and probably always will be, a prejudice against criminals which is not entirely justified. People assume that

all criminals are built on the lines of "Gyp the Blood," whereas a large percentage of the criminals are morally no worse than others. They have simply had harder luck.

Of course, it is only fair to admit that people who write or talk about "criminals" generally mean perverts and thugs. Undoubtedly many of such have an hereditary taint, which, although it makes them no less dangerous to society, entitles them to a more charitable consideration. Many have weakened their powers of inhibition by the use of drugs and alcohol. But as crime is, after all, a purely arbitrary thing, you cannot predicate much about criminals in general. They are criminals for the same reasons that we are all miserable sinners.

Too much should not be expected of the criminal law. Its scope is necessarily limited. It is ill adapted to take the place of religion, ethics, or good taste. It is effective only to the extent that it represents the moral sentiment of the community, and it is a weapon whose edge quickly rusts where public spirit fails to keep it bright.

Unless laws are to be enforced, the fewer of them the better. Unenforced laws breed hypocrisy and lawlessness both in court rooms and outside.

Nothing is more necessary to-day than some substitute for the English system of parliamentary barristers to prevent foolish legislation and to avoid the "jargon" bewailed by Bentham, of which he says:

"It converts the whole field of legislation into a

thicket, impenetrable to the legislator's eye: when he does work, he works blindfold; he works at random, at the hazard of creating more mischief than he cures. As often as this happens, then comes the lawyer's triumph: 'You would be meddling: see now the consequence!'"

All artificial doctrines which tend to hamper the natural action of the juror's mind should be swept away. The criminal law is no place for fictions which breed contempt. The criminal law should be nothing but common sense.

"Behold here one of the artifices of lawyers. They refuse to administer justice to you unless you join with them in their fictions; and then their cry is, see how necessary fiction is to justice!"

While jurors refuse to be bound by fictions of the law which run counter to human experience, they are nevertheless men of untrained minds who need wise guidance if their functions are to be successfully performed. We need judges as well as juries.

The criminal law, like any other branch of administrative government, will be precisely as effective as the sentiment of the community demands. It will be effective in proportion as an enlightened public opinion insists that judges and jurymen shall perform their duties unaffected by the clamor and misrepresentation of the press, and that prosecutors shall be uninfluenced in their conduct by what may be the political results.

VIII

TWELVE GOOD WOMEN AND TRUE

INTRODUCTORY

On the whole, rereading what follows, I am inclined to feel that I have been a trifle too gallant. However, as nothing in this book should be taken too seriously, the various inconsistencies appearing between its covers should be regarded merely as another proof that any really good attorney can handle one side of a question as readily as another. A lawyer must be open-minded, and, while he often convinces himself that he is right in spite of his own knowledge to the contrary, he is quite as likely to be persuaded that he is wrong when his logic seems irrefutable. Most lawyers come out of a case sure that they are beaten. A lawyer rarely can make up his own mind. If he does, he usually changes it. That is his privilege—as well a woman's.

VIII

TWELVE GOOD WOMEN AND TRUE

In that day seven women shall take hold of one man.

—*Isaiah 4:1.*

It is not generally known that women have been serving as jurymen in the United States for half a century. The first jury containing women to be impanelled in any court in this country was drawn in Laramie, Wyoming Territory, in March, 1870. In the East it was the heyday of tight corsets, bustles, furry stovepipe hats, the United States Hotel at Saratoga Springs, gas, and the Eden Musée; in fact, of Mrs. Wharton's "Age of Innocence." The antique high bicycle was not yet even an innovation. Doctor Mary Walker and women's rights—without mentioning woman suffrage—was the comedian's sure short cut across the footlights to a derisive laugh from an audience convinced that it had been divinely ordained since Eden that woman's place was the home unless man saw fit to invite her out. That was, as I say, in the East. But in the West—

Railhead on the Union Pacific reached Cheyenne in '67; in '68 President Johnson signed the bill creating the Territory of Wyoming; in '69 President Grant secured the Senate's approval of his appointees for governor, chief justice, and United States

attorney, and things began to move. Out on the Overland there was a conspicuous absence of style in gentlemen's wear, kind hearts were more numerous than coronets, and the ability to hit a tin can at least twice in mid-air before it fell was rather to be chosen than purple and fine linen. They called Cheyenne the "Magic City," because of the way whole streets of skyscrapers built of tar-paper, lath, and scantlings sprang up overnight. There wasn't much law, and people were careless about what there was. You could hear the Indians whoop, if you listened, and watch the bad men being bad. But, the total population of both sexes being limited, woman had already had an unusual opportunity to demonstrate her claims to equality with man, and up at the mining camp of South Pass City Mrs. Esther Morris had served a term as a justice of the peace with ability and distinction. The first Territorial Legislature, consisting of twenty-one members, of whom twelve made up the House of Representatives, met almost immediately; and, almost as immediately, passed a bill granting women the right to vote and hold public office. For Wyoming sure needed the ladies in her business!

It is difficult to appreciate the furor that this simple precursor of the Nineteenth Amendment had upon the effete East, if not the world. The Territory of Wyoming instantly made its *début* upon the map in spite of Mr. Webster's lack of accuracy in officially describing the Overland Trail as fit only for prairie dogs and Indians. Woman's suffrage owes

a lot to Wyoming, but—Wyoming owes a lot to woman's suffrage. Lackadaisical Saratoga ladies, who had never heard of Montana or Idaho, began to refer to Campbell's "Gertrude of Wyoming," innocently unaware that the Wyoming in question was in Pennsylvania and said Campbell a Scottish poet of the vintage of 1810. It was the first big hit of the suffrage game, and there seemed to be something almost uncannily prophetic in the motto upon the Territorial seal: *Cedant arma togæ*—Let arms yield to the gown.

A little farther west along the Union Pacific line was Laramie, another shed, shack, and shanty city, not yet the Athens of Wyoming by a jackpotful, but a typical movie frontier town of dance halls, saloons, and gilded dens of vice, swarming with desperadoes and the nightly scenes of every sort of violence. As the ordinary juries wouldn't convict, the better element resolved to take matters into their own hands, put down the anarchy that prevailed, and establish order. They did this by calling to their aid the women of Wyoming; and when the grand jury for the regular term of court of the First Judicial District was drawn in March, 1870, there appeared upon the panel the names of Miss Eliza Stewart, a school teacher, and others, the first women to be summoned to serve on a common-law jury anywhere recorded in the world. Thereupon Chief Justice John H. Howe, who, besides having been appointed by General Grant, seems to have borne a rather striking resemblance to him in physi-

ognomy and character, charged the jury in words never before heard on sea or land, beginning: "Ladies and gentlemen of the Grand Jury." He told them that the eyes of the world were upon them, declaring: "It will be a sorry day for any man who shall so far forget the courtesies due and paid by every American gentleman to every American lady as even by word or act to endeavor to deter you from the exercise of those rights with which the law has invested you."

Thereupon arose Prosecuting Attorney Stephen W. Downey and moved to quash the panel on the ground that it was not exclusively composed of male citizens, as required by law. But the chief justice swept him aside and declared boldly that he regarded women as eligible and proposed so to hold, having theretofore in a formal written communication already requested Mr. Prosecutor Downey "to make it known to those ladies who have been summoned on the juries that they will be received, protected, and treated with all the respect and courtesy due, and ever paid, by true American gentlemen to true American ladies, and that the court by all the power of the government will secure to them all that deference, security from insult, or anything which ought to offend the most refined woman, which is accorded to women in any of the walks of life in which the good and true women of our country have heretofore been accustomed to move."

The gallant judge continued: "Thus, whatever may have been, or may now be, thought of the

policy of admitting women to the right of suffrage and to hold office, they will have a fair opportunity, at least in my court, to demonstrate their ability in this new field and the policy or impolicy of their occupying it."

And so the chief justice overruled the prosecutor, and the ladies of Laramie, under the ægis of the law, set themselves to work to help clean up the town, indicting horse and cattle thieves, murderers, and illegal branders, in bills beginning: "We, good and lawful male and female jurors, on oath do say——"

The fact that the system was being tried on the Laramie grand jury and would shortly be tried on the petit jury created a sensation throughout the civilized world, and no less a potentate than His Majesty King William of Prussia cabled General Grant his admiring congratulations. Reporters and crayon men swarmed into Laramie, caricaturing the lady jurors as repellent masculine creatures holding or nursing unattractive babies. It was at this instant that some inglorious Milton invented the deathless couplet:

"Baby, baby, don't get in a fury;
Your mamma's gone to sit on the jury."

Yet those who came to scoff, even if they did not remain to pray, were forced to admit, in the language of the time, that the women had turned the trick; or, in to-day's parlance, had delivered the goods. For those same women jurors, as far as can

now be ascertained, were a success in Laramie. They served; they indicted; they convicted.

The first criminal jury trial at Laramie for murder illustrates practically all the pros and cons involved in any popular discussion of the present question. For the defendant—the murderer—was a tall, blue-eyed, handsome, law-abiding young man of good reputation, named Andrew Howie, who had no business to be loose among the cutthroats and garroters in the tent town of Laramie, where a vigilant vigilance committee had the greatest difficulty in keeping even a semblance of order by the most liberal of hangings.

Pat Doran had reached Laramie before the railroad, and his Shamrock Hotel had been the scene of revelry by night since the memory of bad men ran not to the contrary. Howie, who had for unknown reasons selected the Shamrock as a place of temporary sojourn, had gone to bed up-stairs, but hearing an uproar below had innocently wandered down to see what it was all about. A certain Mr. Hocter had thereupon pointed a pistol at his head and playfully remarked: "I am going to shoot you!" Whereat Howie, as some might feel, rather prudently, had—well, when the smoke cleared Mr. Hocter was no more. Later Howie modestly admitted that he had fired first.

Now here, if at all, the cynic might say that we had every element that would, as he might claim, demonstrate female jury service a farce. We have a man, "tall, blue-eyed, and handsome"—to quote

the record—of good reputation, his life threatened by a ruffian in an evil place, in a district where murder at the time was not regarded as by any means as serious as cattle-stealing.

It is safe to say that no jury of men would, in those days, have found Howie guilty of anything.

Not so the sturdy dames impanelled by Sheriff Nat K. Boswell, sole custodian of the public peace in a little county then reaching from the northern boundary of Colorado to the southern boundary of Montana. Sheriff Nat, ex-Indian and government scout, was the proud exhibitor of arrow scars on his face, and had a record as a fearless and dashing deputy United States marshal from Mexico to Canada. Without delay he summoned to try Andrew Howie for the murder of John Hocter the following: Retta Burnham, Nelly Hagen, Mary Wilcox, Mary Flynn, Mrs. I. M. Hartsough, Lizzie A. Spooner, Jenny Ivinson, and a few men. Then with much discernment he also appointed, as a bailiff, Mrs. Martha Boies, who usually ran a lodging-house but had lost two of her star boarders “when the vigilance committee disposed of three outlaws”—to quote the sprightly narrative of Miss Grace Raymond Hebard, former librarian of Wyoming University, to which we are indebted for the facts herein set forth. At any rate, Bailiff Boies was and still is a woman of unusual capacity and experience. Her chief duty consisted in standing on guard all night in front of the room occupied by the six women jurors finally selected.

The jury listened to the evidence, took the case, and, retiring, struggled to reach a verdict—for two whole days and nights. At last one of the ladies, who happened to be the wife of the Methodist minister, introduced a new feature into petit-jury service by inviting the jury to join her on their knees in an appeal for divine guidance. They then arose and cast their ballots as follows, the minister's wife voting promptly for murder in the first:

	WOMEN	MEN
Murder, first degree.....	1	..
Murder, second degree.....	2	..
Manslaughter.....	3	3
Not guilty.....	..	3

It is interesting to note that neither the defendant's good looks nor the fact that he may have been in danger of his own life when he killed Hocker stood in the way of the women on this jury, unanimously voting for conviction, finding him guilty of unjustifiably taking human life. It is probable that the case against him was stronger than appears from the available records, for the verdict seems to have been a popular one, and he received a sentence of ten years at hard labor. Two years later he was pardoned.

But any idea, such as was apparently entertained before the jury had been selected, that women were chicken-hearted and could be easily won over was quickly dissipated. The women, although shedding

copious tears, nevertheless took the position that a man had been killed and no excuse should relieve the killer from the consequences. It is conceivable that they were, perhaps, unduly resolute in refusing to consider the plea of self-defense. Still, as the minister's wife constantly reiterated: "Whoso sheddeth man's blood, by man shall his blood be shed."

The verdict filled the bad men of Laramie with dismay, and there was an immediate exodus of crooks and gunmen. Many other verdicts of guilty were rendered by the same panel, for the court term was a long one, and at its conclusion it was unanimously agreed that the law had been enforced, crime punished, and property protected. Indeed, Chief Justice Howe was lavish in his praise, assuring Mrs. Sarah W. Pease, one of the jurors chosen later, that they "would make just as good jurors as men, if not a great deal better."

Reading between the lines one might suspect the distinguished judge of being something of a feminist. Further ground for this impression may be found in his ruling that, because the Wyoming statute regarding jurors was passed three days before the statute granting the suffrage to women, the words "all male citizens" contained in the former should be interpreted to include women! However, as the saying is, he was the judge. And as he was judge both of the district court and also of the supreme court, to which appeals lay, he had things pretty much his own way.

Indeed, he warned the disgruntled attorneys that

he would certainly sustain himself, for when the Honorable W. W. Corlett, who had assisted in Howie's defense, threatened such an appeal, he said: "Small comfort you will obtain from that, for a majority of the supreme court—Judge Kingman and myself—will sustain the ruling of the district court, inasmuch as the judges of the two courts are identical."

"Well, in that case, Your Honor," retorted Corlett, "as judges don't resign, there is a possibility of their dying, and all we can do is to wait."

Illness soon forced Judge Howe to resign. With his departure from office women ceased to be summoned for jury service. The question of whether the word "males" means also "females" in Wyoming has never been finally settled by judicial opinion.

In retrospect after fifty years we may surmise that the women in the Howie case felt that they were equally on trial with the defendant, and that Wyoming expected every woman to do her duty; at least, that the chief justice did. Besides, as his photograph suggests, Judge Howe was a dominating personality. Even men, when it is put directly up to them from the bench, will usually vindicate the majesty of the law. As we have elsewhere said, the trouble with the jury system is frequently the judge. Women have served on juries in various States of the Union off and on ever since.

Now, although of course the right to vote does not necessarily carry with it the right or duty to

serve upon the jury and—except from the point of view of political consistency, if there be such a thing—has nothing to do with it, with the passage of the Nineteenth Amendment we may reasonably expect to see a constantly increasing number of States extending the duty or privilege of jury service to women voters.

Each State has and always has had its own statute regarding the composition of its juries, which usually provides that they shall consist of “male citizens.” It would seem that the phrase hardly needed or was susceptible of more than one construction, even by lawyers or judges. It is true that the Latin word “*homo*,” the legal equivalent of our word “male,” was used for both sexes, but even so, as Blackstone explains, at common law under the word “*homo*” the female was excluded “*propter defectum sexus*.” Be that as it may, to-day a “male citizen” means a man and not a woman, incredible as it may seem.

Nevertheless, it is a fact that a large number of otherwise well-informed people—even “homos”—assume that because women have the suffrage they will forthwith as a matter of course begin, *ipso facto* and *ipsa lege*, to sit on the jury. I wish they could and would, but unfortunately they won't. They cannot and will not do so until they, with the other voters in each State, pass the necessary statutes enabling or compelling them to do so, which I trust will be soon. For it is only common sense that women should have the right, if not the obligation,

to enforce the laws which they put upon the statute books.

Yet in spite of this rather obvious legal situation there has always been more or less confusion about the matter in equal-suffrage States, largely owing to the fortuitous circumstance that, as has been just narrated, in Wyoming, the first of the United States to embrace woman's suffrage, the condition of society rendered it desirable, if not imperative, that the women, who naturally represented the best element, should be utilized as jurors; and that there was, as Mrs. Mary Sumner Boyd says in her careful and accurate discussion of this subject, a local judicial representative of the United States who "frankly took the law into his own hands" and "deliberately stretched the right to vote to cover jury duty and drew women on his juries on the ground that in the outlaw communities of his State they were the only solid and reliable citizens."

There are, as she points out, some States where women have the legal right to serve on juries, but there are others where they have served—perhaps still serve—illegally in clear contravention of the statutes. But women do not serve and never have served on juries in all the equal-suffrage States. There is only one such State—Idaho—where the word "male" has been judicially so interpreted as to compel women to do jury duty; and there, according to the attorney general, they serve very rarely indeed. Of other equal-suffrage States, Kansas, Nevada, Utah, Washington, and California per-

mit but do not compel women to serve; Montana, Colorado, Arizona, and the Territory of Alaska interpret the law so as to exclude them; while in Illinois, Wyoming, and Oregon, although they actually did serve at one time, they were deprived of the right later on. That suffrage and jury service do not necessarily go hand in hand is to be seen in the fact that one of the first laws relating to women introduced into the New York Legislature after they had been given the franchise, in 1917, was a bill prepared by the Woman Lawyers' Association to give women the right to serve on the jury, and it was defeated.

From time to time various judges in certain suffrage States have assumed, as did Judge Howe in Wyoming, to take the law into their own hands, even when the law has been construed by the attorneys-general to exclude women from jury service. Some of these judges were eccentric, some merely arrogant, and some, conscientiously believing that it was a good thing to do under the circumstances, did it.

Such recourse to feminine knowledge or insight is not unknown in English jurisprudence, and from early days there are precedents in certain classes of cases for submitting various interesting feminine questions to juries of matrons and others. In the famous case of *Essex vs. Essex*, which the Earl of Essex brought against his countess in the time of King James I for the annulment of their marriage in the consistory court, such a jury was impanelled, and

it rendered a special verdict. The same course was followed in other cases. And in Colonial times in this country there is at least one established instance where a jury of women sat in judgment upon a woman charged with withcraft. To this day the so-called witch dock may be seen in Lynnhaven, Va.

It is too late to question the qualifications of women to serve as jurors. Their physical limitations are no more a reason for their exclusion as a class from jury service than the physical limitations of men. Jurors of either sex may be disqualified at a particular time for a multitude of reasons, and only jurors with a free mind in a sound body need or should be required to serve. Whatever may have been the actual fact as to the character and competency of women in mediæval times, any reflection upon their capacity to serve as jurywomen belongs rather to the Dark Ages than to to-day. We even have the temerity to question the soundness of the law attributed to Moses by Josephus: "Let the testimony of women not be received, on account of the levity and audacity of their sex." and of those of Rome and of mediæval Europe which excluded their testimony in certain cases. Nor have we the slightest sympathy with Mascardus, who said: "Generally speaking, no credence at all is given to women, and for this reason, because they are women, who are usually deceitful, untruthful, and treacherous in the very highest degree." Even as late as 1821, in Bern, the testimony of two women was required to counterbalance that of one man, and a

virgin was entitled to greater credit than a widow. Reserving decision upon the credibility of widows, I have no hesitation in asserting that I would rather prosecute a criminal before a jury of women than of men—if I wanted to convict him—for I believe that women jurors will be more apt to find verdicts in accordance with the law as it is, and enforce the statutes as they stand upon the books, than men are to-day.

No man knows anything about women, and very little about any one woman; but I should say from my limited opportunities of observation and experience that while woman individually is a somewhat lawless creature, regarding herself as privileged and exceptional, women as a class are respecters of law and fierce champions of equality and justice. Woman, due doubtless to millions of years of oppression, often feels that in her own case anything is justified to secure what she regards as her rights. She has a strong proprietary sense, and just as her possessions have for her a special sacred quality of their own, so where she is wronged it seems to her a special wrong. She is justly fearful of injustice, discrimination, and brute force; and suspicious that her ignorance of business will be taken advantage of. For these reasons where she individually is concerned she is apt to see red and let the law go hang. But when she is called upon to administer and enforce the law for others her very suspicions will lead her to apply it stringently and literally.

It will now be possible to give Colonel Roosevelt's

theory—that the best, if not the only, way to get rid of bad or undesirable laws is to enforce them—a fair chance. Heretofore, where an attempt has been made to carry out this idea, the usual result has been that when violators of unpopular laws were arrested the juries before whom they were tried refused to convict. This used to be the case in many liquor tax prosecutions. During a period of some six years in New York County, out of 1,058 cases of various violations of the New York liquor tax law, transferred by court order from Special Sessions—where only misdemeanors are tried—to General Sessions—where felonies are tried—for submission to a jury, 810 were dismissed by the grand juries who were asked to indict, and out of 176 cases actually tried there were only four convictions.

I am willing to guarantee that if those big and little juries had been composed equally of men and women, not only would there not have been such wholesale dismissals and acquittals, but that a majority of the defendants would have been promptly convicted and sent to prison. Women would have enforced the liquor tax law then, and women—whatever men may do—would and will enforce it now. It may not be for nothing that the Nineteenth Amendment followed the Eighteenth so swiftly. I believe that where women serve as jurors they will enforce the law whatever it is and that we shall have to stand for our laws or get rid of them. It is worthy of mention in this regard that the Laramie grand jury of 1870 was so insistent

upon the enforcement of the laws relating to gambling, saloon regulation, and Sunday observance that the Legislature immediately repealed the Sunday-closing law.

With women on the jury, Colonel Roosevelt's theory can now have practical application, for if juries are willing to convict under an unpopular law no mere judge is going to assume alone the onus of letting the defendants go scot-free. No judge, however it may be with a jury, can individually afford to disregard or negative the law. Remote on his dais he may complacently permit the jury to play ducks and drakes with justice, frankly condoning their willingness to violate their oaths out of their hostility to the law or their sympathy for the prisoner; for the responsibility for their lawlessness is divided among twelve, here to-day, gone to-morrow, and quickly forgotten. It is an entirely different matter when the jury has convicted and it is up to the judge to decide whether he shall publicly deride the law or enforce it. It is one thing for a judge to smile benignly at the irresponsible performances of his jury—implying "What can you expect with a law like that?"—and another to stand up in the public view and turn the offender loose. He won't do it.

With women on the jury the laws will be enforced. For women, at least at first, are going to take their civic duties very seriously. I say "at first," because no one can tell whether their present intent earnestness will survive permanently to jack up the pep-

less male attitude toward jury service, so that we shall have a new and stimulating era in the administration of criminal justice, or, when the new has worn off, women juries will become as lackadaisical as the men.

The trouble with the ordinary male jury is that unless it is controlled by a judge of vigor and intelligence it will go bad simply out of inanition. A capable judge can take the mediocre hodge-podge of masculinity before him and mold it in three days into an effective piece of juridical mechanism. But the judge has got to be an idealist and believe in the legal system that he administers. The ordinary run of jurymen are well-intentioned, good-natured, fairly conscientious, and ready to do their part as well as they can. They take their cue from the bench. They have heard a good deal about the farce of jury service, the "higher law," the trickery of shysters, the corruption of the judiciary, the blood-thirstiness and venality of prosecutors, and that there is one law for the rich and another for the poor; they are diffident, self-distrustful, grateful to the "strong" man of their number who knows it all and is willing to assume the responsibility for their verdict. They follow him like sheep, and, like sheep, they often go astray.

Or they follow the judge. And there, too, they often go astray! They have got to follow somebody. And if the judge happens to be one of the jelly-back brotherhood, who does not dare to make up his own mind or to take a firm stand about anything,

or is trying to make a reputation as a protector of the poor and lowly as against the scornful plutocrat; or is playing the political or any other game; or cringes to the press—the jury goes astray very quickly, for the judge will allow it to get the impression that the whole performance is just a cloak under which he and it purpose to “do substantial justice”—that is, the justice that the judge and his friends, and the jury and its friends, or the newspaper proprietor and his followers, want in any particular case; and that the oath of the juror and the wording of the law are to be taken only in a Pickwickian sense, or at any rate with mental reservations—to be regarded as elastic things.

Thus it has come about that jury service among men is accompanied by certain persistent fictions; such as that it is unchivalrous to convict a woman of crime; that certain laws were never intended to be enforced; that there is a peculiar higher law applying to what the French call the *crime passionnel*; that the plaintiff suing a corporation for personal injuries should always be given a verdict of some sort; that the judge doesn't half the time really mean what he says—just has to say it; and so on.

Well, if I mistake not, with women in the box these fictions, which to-day in practice are somewhat more than fictions, will become fictions indeed. I foresee women jurors listening with rapt attention to the evidence and applying the law with literal exactitude; teaching their husbands and brothers lessons in fortitude, with the tears in their eyes; and

exacting from lawyers and judges a standard of courtesy and refinement which has to-day fallen shockingly low. The number of men who become boors by reason of a little authority on the bench is distressing. I don't believe the women will stand for it. They will get back at such a judge somehow and sometime, and he will at all times be jolly well aware of that undesirable possibility. Judges, take warning! Women are going to vote as they please, and they are going to vote only for those who please them. They will not vote for judges who do not fulfill their ideal of what the judiciary should be, and a slab-sided, easy-going political judge will shock them as much as a jazzing parson; perhaps more.

It is along the lines of political and social education, rather than any actual difference in the working of the jury system, that I should expect results from the service of American women in the talesmen's box. I have hinted at one aspect of this above—its practical effect upon the manners of the bench and the dignity of legal procedure. But their presence in and about our courts and jury rooms may have another influence more far-reaching in its ultimate effect.

In the time of Pericles and the Hellenistic age the Greek cities vied with one another in erecting buildings the beauty of whose architecture should lend dignity and elevation to the transaction of public business and the administration of justice. Such examples of the power and permanence of the state

and the ideals that it represented were a constant inspiration to the citizens. Many of our own county courthouses, to say nothing of our police courts, are inferior in sanitary accommodations and general cleanliness to high-class kennels. The witnesses and spectators are herded together in evil-smelling rooms like so many cattle, and browbeaten and hustled until they smart with indignity and humiliation. After one such experience many an honest and patriotic citizen prefers to lose his money, go without his day in court, or be derelict in his civic duty rather than undergo another. The whole physical aspect of court procedure—at best not a particularly congenial sort of business—becomes something to be shunned and shuddered at. The effect of their surroundings upon jurymen will be obvious in their conduct. Dignity and decorum will play their part in the jury's deliberations and in their verdict. As Breasted says in his "History of Ancient Times": "It is instructive to compare such a little Hellenistic city as Priene with a modern town of 4,000 inhabitants in America. Our modern houses are much more roomy and comfortable, but our ordinary public buildings, like our courthouses and town halls, make but a poor showing as compared with those of little Priene over 2,000 years ago."

Which naturally brings us to that other much-to-be-desired consummation which I, perhaps fatuously, am sufficiently optimistic to anticipate may follow as a natural consequence of the association of women with men in the administration of jus-

tice. I refer to the probable improvement in courtesy, consideration, and general amiability among the participants, particularly the attorneys.

“O woman! Lovely woman! Nature made thee
To temper man; we had been brutes without you.”

One of the grave disabilities of lawyers, whose lives are largely spent in wrangling and argument, is that they tend to become abrupt, assertive, contradictory, and mannerless, snappish with their wives and children, and cantankerous with their friends. Your lawyer—even a high-class one—is apt to be a social nuisance, challenging every statement and cross-examining everybody. He forgets that the purpose of going out to dinner is to have a good time, in his habitual insistence on accuracy and consistency. I even know one who has unconsciously formed the habit of inevitably making everybody repeat whatever he or she says—“What’s that?”—after which he sharply challenges the statement with “How do you mean—irresponsible?” or “How do you mean—sweetbreads?” It is even on record that when presented with an innocent gift by his wife he automatically inquired: “How do you mean—Christmas present?”

Now I believe that just as women jurors will compel at least common decency from the bench, so the presence of women in the jury box, upon whom he must make a favorable impression, will exact from the trial lawyer a new code of manners.

He will doubtless—even if mistakenly—believe that on the personal impression he makes upon the ladies before whom he is to appear his success will in no small measure depend.

“For courtesy wins women all as well
As valor may.”

So instead of snarling and backbiting at his opponent he will ape the urbanity of a Chesterfield. Which is, after all, only another way of expressing the platitude that the more men associate with women, no matter whether it is in politics, business or society, the better it is for them. The little dictator in his own house will learn that even if he can bully the woman who cooks his dinner at home, he can't bulldoze her friends on the jury. We need women in court and on the bench just as much as we need them elsewhere.

It is needless to revert to many of the absurd objections that in the past have frequently been urged against jury service for women. They belong only to those long-past eras when women were supposed to be not only frail and frivolous but deceitful and demonic; or to those more recent times when they swooned at the sight of blood or had hysterics on the slightest excuse. Well, I personally never yet saw a woman faint. Nor, save on the stage, have I ever seen a woman have hysterics. My dentist tells me that women are incomparably pluckier than men under the agonizing burr of the drill, and upon those occasions in my experience which called for

calmness and self-possession I have found the women fully as composed as the men. The idea that women lose their heads when engaged in serious business is ridiculous. It is all part and parcel of the nonsense invented to bolster up those dogmas of ancient times, first that woman was but a chattel, later that she could be only a mistress, and more recently that she was a sort of sweet idiot who couldn't be trusted to go out alone.

We are told that women are ultra-sentimental; that their emotions will get the better of them. Emotions? Sentiment? There are no more emotional jackasses in creation than the ordinary jury of men—grand or petit. Mr. Ordinary Citizen, who at fifty leads a life of uneventful regularity consisting of about eleven hours of sleep, five hours of mild labor, a short walk home, three large meals, nine cigars, and the evening paper, is like a fat ox led to sacrifice upon the altar of sentiment. In the melodrama of the courts his sluggish blood leaps through his veins as it has not done since he was twenty; he thrills deliciously at the story of the detectives, but when the beautiful adventuress or the child wife takes the stand he—figuratively—takes her in his arms, irrespective of her defense, and promptly acquits. If I am ever brought to the bar of justice may I have to decide my fate a fat male jury of my peers with no sprinkling of thin-lipped, suspicious, high-minded females.

Indeed, the question seriously suggests itself whether juries composed entirely of women would

not be more effective than those made up of men, for the very reason that women would be far less moved by sentiment in applying the law as it stands than men would be. They certainly would deal more rigorously with members of their own sex. Men are not willing to convict women of murder; and it must be a clear case to persuade them to convict them of anything. Woman was the original cause of man's fall, and he has been falling for her ever since, while *per contra*, woman's pose has always been that of indifference and coolness, from which she must be wooed. An attractive man on trial before a jury of women might excite more sympathy than one of their own sex, but I doubt it. And anyhow, who knows what sort of man is attractive to women?

Naturally there is no reason to suppose that most of the usual faults of the all-male jury would not be manifest in a jury composed entirely of women. They would still undoubtedly go outside the evidence and usurp the province of the judge, on the theory that they were there to do justice instead of, as is the case, to decide a limited question of fact. American juries of men are very prone to take the law into their own hands. The same tendency would probably show itself in women juries, but to a lesser extent. If they thought the prisoner ought to be given another chance they would very likely acquit, just as men are apt to do now, instead of convicting and letting the judge suspend sentence.

But women would, I feel sure, have a less lenient attitude than men toward defendants accused of commercial fraud, such as making false statements as to financial condition in order to secure credit. So much sharp practice is winked at in business that men jurors are apt to look upon such prosecutions with averted eyes. It is difficult to persuade a tradesman who has padded his own stock account or hiked up his own orders on hand or bills receivable; who has shortweighted his own customers or sold them inferior goods on glowing misrepresentations—to convict a fraudulent bankrupt or a retailer who has misrepresented his assets to this bank. He and his fellows don't like to stigmatize as criminal what so many "good fellows" are doing every day. But women would have no such weakness. Dishonesty of any sort in business would, I am confident, appeal to them as deserving punishment, and their disapproval would be swiftly evidenced in a verdict of guilty.

And now having indicated the great spiritual benefits that would accrue to all of us by reason of the presence of women in the court room, and foretold how a golden era of dignity, courtesy, and amiability would inevitably ensue, judges becoming gentle as sucking doves, and lawyers as sweet and lovable as lambs; and having furthermore shown that jurors instead of turning weaker by virtue of having women in their number would, on the contrary, show themselves adamant to the influence of either Apollo or Aphrodite and convict everybody of

everything; having, I say, heralded with such enthusiasm the coming of the woman juror, may I now be permitted to suggest that the educational effect of her personality in court might not end with the bench and bar, but might even be felt in the jury box by the lady herself?

With entire respect for the intellectual qualities of the sex to which I do not belong, I hazard the opinion that jury service will undoubtedly have a highly advantageous effect upon those women who participate in it. It cannot but be so. Familiarity with law and court procedure at first hand, personal observation of the actual working out of what otherwise would be but vague and only half-understood academic theories, and, most important of all, learning under the instruction of an impartial and dispassionate judge the meaning of logical argument, the rules of evidence, and the difference between the mere assertion of a belief or conclusion and the reasons upon which the latter are based—these are well worth while. Men are commonly supposed to rely upon their powers of reason, women upon their intuition. I do not apprehend that so far as results are concerned any one would have the temerity to claim that, in this, woman was at any real disadvantage. What better than Lucetta's:

“I have no other but a woman's reason:
I think him so, because I think him so”?

All we really mean is that women do not take the trouble to try to apperceive the logical steps by

which they reach their opinions. Men, on the other hand, are required and trained to do so. If the "homos" were not such pompous idiots they would realize, just as women do, that the important thing is what a person thinks, not why he thinks so. And, anyhow, the men themselves are chiefly responsible for women's refusal or inability to give in proper logical form and sequence the reasons for everything they think. It began fifty thousand years or so ago, when the male vocabulary of our neolithic ancestors consisted principally of the equivalent of the modern "Shut up!" accompanied by a thwack by a stone club over the female skull. Until recently there has never been any disposition on man's part to let woman reason. He assumed an attitude of intellectual superiority and was afraid to let her argue—lest the whited sepulchre of his own ignorance should be exposed; preferring, so to speak, rather to be chivalrous than just. He insisted upon doing all the thinking himself, on the ground that it was his own exclusive business. Of course I am referring to the Stone Age, and not to the present era of marital courtesy, where the husband inevitably surrenders the newspaper to his wife at breakfast and listens attentively to all her views, expressed in detail, on religion, politics, and philosophy. All I venture to assert is that in the old days women were not given half a chance to learn to reason, and we are now suffering the consequence.

Well, why not give them the chance now, by putting them on the jury? I don't say the world

will be any happier if women learn to be entirely logical, or justice be any more adequate, but at least both sexes will learn to talk the same fool language in the same fool reasonable way, and the family breakfast table will not echo so frequently to the masculine "Well, what of it?" "Suppos'n' it does?" "What's that got to do with it?" and "Why didn't you say so, then?"

For between ourselves, ladies, all this talk about man's reason is bunk and vanity. The chairman—male—of a board of directors—all male, the toast-master—male—at the chamber of commerce banquet, or the presiding officer—male—of any male gathering is usually merely the complacent personification of man's idea that he is the whole cheese. No woman would have the patience to listen, as her long-suffering consort does, to the interminable, prosy, masculine harangues at board meetings, where the chief concern of the speaker seems usually to be far less in what is going eventually to be done than in the pedantic and tedious expression of his views, wherein he sets forth every step in his reasoning processes, floundering ponderously along from premise to conclusion until his listeners have long since committed manslaughter in their hearts. Yet that is how it is done, and if women are going to participate in affairs they must learn to do it, too, and not merely to say, "Well, I've looked into this and I think it's a good thing to do." No, no! You mustn't! There is an esoteric, an adept way of doing these things.

You must be weighty in meeting and logical in court, which means that you must be able to explain to the jury—remembering that they are only “homos”—that if a horse is an animal, and a man is an animal—then a man is a horse.

Pardon! The typesetter got that wrong! Anyhow, the point is that women really ought to be taught to express themselves logically and to give the facts upon which they base their conclusions—in a word, to be accurate thinkers instead of mere asserters. The jury box is a good place to do this. After they have heard a few of those illuminating interchanges between judge and counsel they will discover how ignorant they have been heretofore of the difference between fact and mere conclusion—for of course a conclusion is anathema to a judge! They may see an intelligent-looking witness take the stand, be sworn, and testify that he observed the prisoner upon the sidewalk and that he was drunk.

“Object! Conclusion!” cries the prisoner’s lawyer, springing out of his chair in horror.

“Strike it out! Don’t say he was drunk; that is merely your own opinion! We don’t want your opinion! We want facts! Tell us what you saw!” admonishes the judge.

“Well,” answers the witness, “I seen this feller on the sidewalk and it was clear to me he’d been drink——”

The judge interrupts angrily: “Do you want to be committed for contempt? What did you observe? Give us facts!”

The witness repeats stubbornly: "I say I seen he was drunk."

"There you go again!" the judge exclaims wildly. "Strike it out! Look here, if you don't give proper testimony I'll have to lock you up! How do you suppose we can come to any decision about the man's condition if you don't tell us what you know about the case?"

After a few weeks of this the newly impanelled female juror will learn that she should never intimate to a court that a man was irrational or intoxicated, but that in these rarefied assemblies dealing only with pure and scientific fact she must carefully state that she observed the defendant rotating in a semivertical posture across the sidewalk diagonally to the building line as laid down in C. VIII, Sec. 473, Sec. 4a of the City Ordinances of 1907, and that an odor emanated from him similar to that previously smelled by her when on a certain occasion her husband had opened a bottle labelled "whiskey"—with a slight suggestion of clove.

Now it is obvious that when our wives and daughters learn the art of logical converse home life will be an entirely different thing for us. The unseemly wrangling in which paterfamilias has hitherto patiently sought to demonstrate to the indignant female members of his family that what they claimed didn't follow from what they said, will become a thing of tradition—of cuneiform comic supplements. If women are to participate in the governmental functions of men it is well that they should train

themselves to restrain their inclination to take intellectual short cuts and their impatience at the cumbersome way men have of doing things, and learn to argue according to the Marquis of Queensberry Rules as laid down in Wigmore's "Law of Evidence," Vol. 1-6, Sec. 1-5891. After all, if a doubtful question must be decided or a disputed fact determined, analysis is better than "Well, I say it is!"

For the habit of relying on intuition carries with it one obvious danger—a willingness to overlook or even to sweep aside inconsistent or contradictory facts; with the result that woman's testimony is often along the lines of what she thinks ought to be rather than what is—like Saint Paul's definition of faith, "the substance of things hoped for." Since our courts are organized on the principle that testimony not deduced by the syllogistic method from the observation of relevant fact is valueless, woman as a probative force has in the past testified at a disadvantage. The honest woman may have quite as good a basis for her opinion that the prisoner is guilty as the man witness who can tell the court why he thinks so, but in many instances she has never learned to reason—having never really found it necessary to do so—and has wandered through life by inference—or, more frankly, by guesswork—until she may no longer be able to point out the stages of her most ordinary mental processes.

Jury service has taught men to be more exact in their own court testimony, public utterances, and

private conversation. It has taught them to analyze their own impressions and distinguish observation from mere opinion. It will do the same thing for women, making them of inestimably more value as witnesses in court, administrators of public and private affairs, and possibly even more satisfactory social companions.

IX

BEWARE OF THE DOG!

INTRODUCTORY

"Mr. Appleboy, take the stand. Where did you get that dog?"

Mr. Appleboy looked round helplessly.

"My wife's aunt lent Andrew to us."

"How did she come to lend Andrew to you?"

"Bashemath wrote and asked for him."

"Did you know anything about the dog before you sent for it?"

"Oh, no!" returned Mr. Appleboy.

"Didn't you know it was a vicious beast?"

"I'd never seen Andrew."

"I would like to ask a question," interpolated a fat juror on the back row.

"Yes, sir!" responded Appleboy.

"I want to get this straight. You and your wife had a row with the Tunnygates. He tried to tear up your front lawn. You warned him off. He kept on doing it. You got a dog and put up a sign and when he disregarded it you sicked the dog on him. Is that right?"

He was manifestly friendly, merely a bit cloudy on the cerebellum. One of his associates pulled him sharply by the coat-tails.

"Sit down," he whispered. "You're gumming it all up."

"I didn't sick Andrew on him!" protested Appleboy.

"But I say, why shouldn't he have?" demanded the fat juror. "That's what anybody would do!"

Mr. Pepperill, the prosecutor, sprang frantically to his feet.

"Oh! Oh! I object. This juryman is showing bias!"

"I am, am I!" sputtered the fat man. "I'll show you —!"

"Mrs. Appleboy!" called out Tutt, just in the nick of time. "Will you kindly take the chair?" And that good lady, looking as if all her adipose existence had been devoted to the production of the sort of pies mother used to make, placidly ascended the witness-stand.

"Did you know that Andrew was a vicious dog?" inquired Tutt.

"No!" answered Mrs. Appleboy firmly. "I didn't!"
O woman! Woman!

"That is all!" declared Tutt with a triumphant smile.

"Then," snapped Pepperill, "why did you send for him?"

"I was lonely," declared Bashemath unblushingly.

"Do you mean to tell this jury you didn't know that that dog was one of the worst biters in Livornia?"

"I do!" she replied. "I didn't know anything about Andrew personally."

"Didn't you hope the dog would bite Mr. Tunnygate?"

"Why, no!" she answered. "I didn't want him to bite anybody."

Pepperill gave her a last disgusted look and sank back in his seat.

"That is all!" he ejaculated feebly.

"One question, if you please, madam," said Judge Witherspoon. "How did you happen to have the idea of getting a dog?"

Mrs. Appleboy turned the full moon of her homely countenance upon the court.

"The potato peel came down that way!" she explained blandly.

"What!" exploded the fat man.

"The potato peel—it spelled 'dog,'" she repeated artlessly.

"Lord!" suspirated Pepperill. "What a case! Carry me out!"

Tutt elegantly arose.

"There's no evidence here whatever of scienter!" he announced. "I move the jury be directed to return a verdict of 'not guilty.'"

"Motion granted," said Judge Witherspoon, burying his nose in his handkerchief. "I hold that every dog is entitled to one bite."

—From "The Dog Andrew," "Tutt and Mr. Tutt," pp. 156-162.

IX

BEWARE OF THE DOG!

“CAVE CANEM!” These two familiar Latin words might be freely translated “If you own a dog—look out!” for the dog owner takes quite as much of a chance as the one he imposes upon the public, the difference being that while the public may be bitten he may have to pay for the bite.

To read, mark, and properly digest the reported cases in the books respecting animals—largely dog law—would take years; to attempt to harmonize them, a lifetime. Dogs, although almost human, are wayward animals, and judicial opinion concerning them is equally wayward. Considering the number of dogs and cats in the world and their widely varying personal idiosyncrasies it is surprising that their owners do not become involved in litigation more often, particularly if it be realized how subtle are the tests by virtue of which the owners’ liabilities—those represented in a dog fight, for instance—are determined in the courts. There is a lot of law on dog fights—some good and some bad, depending on whether you win or lose your case. Your dog may win the fight, but alas, his victory may cost you money! There is no chance to seek counsel while the battle is raging. It is better to

take time by the forelock than to drag your victorious animal out of the *mêlée* by the tail.

Let us suppose, then, that you are the proud owner of a gallant and stocky bull, who so far as you know is always happy and bright, amiable and loving to all the world of dogs. Shall we call him *Cæsar*? You are standing on your front lawn with your pet when an innocent canine stranger makes his appearance. Instantly *Cæsar*, contrary to all the rules of hospitality and in violation of your preconceived notion of his disposition, flings himself upon the visitor and in the ensuing conflict damages him severely. Under these circumstances the courts have held that you are not liable to the owner of the injured dog in damages, for the reason that you did not know that *Cæsar* was vicious—if indeed he proved himself so to be in the encounter—and also that as the stranger was uninvited you had the right to use what seemed to be reasonable means to drive him off—to wit, *Cæsar*. But—and mark this well!—had you known *Cæsar* to be a ferocious beast whose high resolve and consuming passion were to devour alive all dogs who crossed his path, and the same thing had happened—that is, a visitor had trotted upon your lawn and *Cæsar* had instantly chewed him up—you might in some jurisdictions have had to pay for *Cæsar*'s dinner. In fact, knowledge of a dog's propensities on the part of his owner is usually the crux of any dog case, although the law upon the general subject is involved and you can usually find authorities on both sides.

Thus you can slightly vary the facts of Cæsar's case and try to see where you would get off. Suppose, for instance, the strange dog were also a blood-thirsty beast who insolently swaggered upon Cæsar's lawn and challenged him to combat. "Dog eat dog!" Or contrariwise, suppose, being a gentle dog but yet a trespasser, he nevertheless killed Cæsar, who, equally gentle, had gently sought to persuade him to depart? It easily gets to be like a picture puzzle. Perhaps it would be better to return to these complications after we have examined into the more fundamental principles governing the law of dogs.

To start with: What is a dog? This may seem a simple-minded sort of inquiry, yet a vast amount of evidence might be taken and much scientific learning displayed before it could be finally settled. Animals are held to be "all irrational beings endowed with the power of voluntary motion." This might appear to some not only to include many men but to exclude many dogs. However, assuming that dogs are animals within this definition, what constitutes a dog a dog? Or, conversely, when is a dog not a dog? When he is a wolf, perhaps? But what is the difference between a dog and a wolf? Is a dog a domestic animal? And what is a wild dog? These questions are not frivolous, but are of importance. So whether a dog is or is not a wild animal may easily determine whether or not a man shall go to jail. Thus the highest court of the State of Maine has held that one cannot be convicted for killing a dog under a statute penalizing the killing or wounding

of domestic animals, on the ground that dogs are not recognized as such. (*State vs. Harriman*, 75 Me., 562.)

Originally, indeed, the common law was loath to regard dogs as property at all. The ancient cases covering property rights in animals are among the most interesting in the history of English jurisprudence; and it seems that the common law recognized only "the mastiff, hound, spaniel, and tumbler."

Blackstone says: "Larceny cannot be committed of such animals in which there is no property either absolute or qualified . . . As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny."

The reason for the disinclination of English judges to regard dogs as subjects of larceny lay in the fact that all felonies were punishable in England by hanging, and larceny was a felony. Even a hanging judge, though he might hang a man for stealing a sheep, could not bring himself to hang him for stealing a dog. Thus it was said: "The taking . . . of any creatures whatsoever which are *domitæ naturæ* and fit for food, as ducks, hens, geese . . . may be felony"; but subjects of larceny "ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, however they may be

valued by the owner, shall never be so highly regarded by the law, that for their sakes a man shall die." (1 Hawk. P. C., Ch. 33.)

Nevertheless, "among our elder ancestors, the Ancient Britons, cats were looked upon as creatures of intrinsic value, and the killing or stealing of one was a grievous crime," and one fortunate cat which held royal office was thus protected by the law: "If any one shall kill or bear away by theft the cat which is Warden of the Royal Barn, it shall be hung up by the tip of its tail, its head touching the floor, and over it shall be poured out grains of wheat until the last hairs of its tail shall be covered up by the grain"; this being the measure of damages to be paid by the thief. According to the Dimetian Code, "whoever shall sell a cat is to answer for her not to go caterwauling every moon; and that she devour not her kittens; and that she have ears, eyes, teeth, and nails, and is a good mouser."

Animals have received their full share of attention at the hands of the law from the earliest times. The law regarding them is voluminous, yet there is no textbook upon the subject of animals, not even a handbook on dogs and cats, although Sir Henry Maine says somewhere that canine jurisprudence under the old Irish law had achieved such development that a large part of one of the Brehon law tracts is devoted to the laws relating to dog fights and the injuries sustained by persons concerned in them either as backers, owners or spectators.

There is no authoritative legal definition of "dog." The Supreme Court of Indiana (*State vs. Giles*, 125 Ind., 154), though not deciding specifically whether or not they are animals, has adjudged them to be "brute creatures and domestic fowls." This is no more surprising and probably no less logical than the decision classifying trained serpents as implements of a trade or profession. The court's failure in the *Giles* case to decide specifically that dogs were animals was perhaps remedied by Judge Maston, of Michigan, in the celebrated dog case of *Heisrodt vs. Hackett*, in which he held that dogs are neither persons nor constables, and that a statute permitting any person and requiring police officers to kill unlicensed dogs, does not justify one dog in killing another dog of his own motion. In this last case it appeared that a nice little dog which had strayed upon the defendant's premises had been attacked by a large, ferocious dog and killed. The defendant claimed that the little dog had no collar on and under a local statute could have been killed by anybody.

Said the court: "It does not clearly appear from the record under what particular part of this section defendant's dog was, or claimed to be, acting when he committed the deadly act. He seems to have considered it his duty to kill the plaintiff's dog. Yet it is not clear from the record, and I am not satisfied we have any right to presume, that he, defendant's dog, was either *de jure* or *de facto* a police officer or constable, and if he held neither of these positions

at the time, then clearly it was not his duty to act in so summary and so severe a manner. Neither does it appear that defendant's dog ever applied to the township or city treasury and received therefrom the compensation to which such officers are entitled in like cases, so that it cannot be said that the proper public authorities ever, by paying him, ratified the act. We are satisfied he does not come under the other clause which permits 'any person' to kill such animals, and shall therefore dismiss that branch of the case from further consideration."

There seems to be something inherent in dog cases that incites every judge who tries one to mad waggery or maudlin sentimentality. There is more gush over dead dogs, and more asinine humor from the bench over live ones, than is ever wasted on either the deceased or the defendant in a murder case. Few judges can resist quoting "Old Dog Tray," Goldsmith's "Elegy on the Death of a Mad Dog," and Byron's epitaph to his dead St. Bernard, to say nothing of the inevitable references to Cerberus, Landseer, and the joy of following the hounds, on the part of legal luminaries who never got nearer to a fox hunt than a barroom sporting print. Such literary efforts usually begin with a barefaced allegation that it is customary to despise the dog as a mean, cowardly creature, fit only to be kicked about, to have a can tied to its tail, or at best suffered to shiver in a corner beyond the heat of the fire. The heroic expounder of canine merits then boldly declares that the time at last has come

to stand up for the poor downtrodden brute, and proceeds to picture him as the friend of man from the time of the Pyramids to the present day, from the frozen pole to the torrid zone. But bad as bathos can be, all self-respecting dogs are entitled to resent the levity which the mere mention of the canine breed seems to arouse in the judicial breast.

It is, of course, to-day well established in most jurisdictions that a dog is a domestic animal and that its owner has the same right of property in it as in anything else, which he can defend in equal fashion, and for damage to which he can sue in the courts. But this is not so everywhere, and the courts were for a long time slow in adopting the view that a dog could have any particular value or that the owner of a dog run over by a wagon, trolley car or train, or otherwise injured carelessly, could successfully maintain an action.

The theory was that a dog's ability to look out for itself was such that anybody could take it for granted and that obviously if the dog was injured it must have been guilty of contributory negligence; but by a recent Tennessee case it has been definitely held that a motorman cannot rely on a dog's celerity to get away, but must give warning by slowing down and ringing the bell if the dog is setting, or pointing at game, from between the rails; and this in the face of a famous Pennsylvania mule case holding no such duty to exist, because a mule could not be supposed to listen and take warning—asinine law, as it were.

To-day dogs can be the subject of larceny, of conversion, and for damages when killed or injured through the fault or intention of others. Any animal which has escaped from its owner can be followed and recaptured, or replevied from the possession of another, no matter how long a time has elapsed since its escape or how great a distance has been covered in its flight, unless it is a tamed wild animal which has succeeded in regaining its native habitat "*sine animo revertendi*"—that is to say, "without the intention of returning." This principle has a dual result, each of considerable importance, for so long as a beast's owner can still claim it as his he is naturally liable for any damage it may succeed in doing up to the moment when it has regained its natural habitat and become legally wild again.

Should a panther or elephant escape from a circus the owner could pursue his property indefinitely and, similarly, would be indefinitely liable for all the damage it might see fit to perpetrate. In such a case we should probably find its owner claiming with much eloquence that it had successfully achieved its freedom if it were recaptured in the wilds of Central Park.

There is a case where a sea lion held in captivity near New York City mysteriously disappeared, turning up some time later more than seventy miles away in a fish pound on the New Jersey coast. It was there held that its master had lost ownership, as it had returned to its natural habitat—the sea, although it had come originally from the Golden

Gate. This seems sensible enough, for, after all, it had had the whole Atlantic to roam in and probably had not got into the fish pound intentionally. But to say that a canary, parrot, organ-grinder's monkey or a rare and exotic beast or bird in a zoo belonged, if it escaped, to the first person who could lay hands on it would, naturally, be extreme.

It has never been decided how long one would be liable for the acts of an escaped animal, but the liability would probably continue as long as the animal's ownership could be established. The rule is that "when the animal is commonly found in a state of nature in the district where the mischief is done the responsibility presumably ceases when the animal has recovered, *sine animo revertendi*, the condition of liberty from which it was taken."

As an old case puts it: "If one hath kept a tame fox which gets loose and grows wild, he that hath kept him shall not answer for the damage the fox doth after he hath lost him and he hath resumed his wild nature." (*Mitchill vs. Alestree* [1676], 1 Vent, 295.)

Having thus delicately warned the reader of the far-reaching possibilities latent in owning a dog or other animal, we shall now proceed to introduce him to that subtle doctrine—that bulwark of defense to dog owners—the silver lining, so to speak, of the law of animals—the principle of *scienter*. For know ye, all who have, hold, own, possess, control or harbor any of the canine race, that though dogs are now property—no longer even base property—there is

at common law a special and peculiar legal rule in the case of animals, by which exception the owner is not under any obligation to find out whether his animal is really dangerous or not!

If you own any other kind of property—no matter what—you are bound under the law to ascertain whether it be safe or not, and you are responsible not only for the dangers you know and foresee **but** for those you ought to have known and foreseen. But with animals—thanks to good old *scienter*—you are responsible only for the dangers of which you actually know, not for those of which by care you might have perhaps quite easily informed yourself!

Thus no matter how ugly or terrifying be the bulldog which you buy, or how horrible his growl, unless you have positive information to the contrary you may legally assume that he is as gentle as a sucking dove and would not harm the juiciest calf. And—this is the best of it for us dog owners!—the other fellow has got to prove that we knew our dog was a dangerous dog before he can make us liable for the damage our dog sees fit to do. Surely the common law uncommonly loves the dog!

Suppose Cæsar—the pet previously referred to—catches sight of the butcher's boy at your back door, is attracted by a certain part of his anatomy, selects a spot, takes aim, and discharges himself at it with an air of confidence and skill begotten of what looks like lifelong experience, so that said boy flees down street with Cæsar affixed to and gyrating in the air behind him—can the butcher recover damages for

Cæsar's act? Nay, he cannot. And why? Because the common law presumes that you never suspected up to that instant that Cæsar had any such outrageous propensity.

However if the act committed is one toward which the general species of the animal has a natural propensity, the law presumes you to have knowledge that it is in the habit of doing that very thing. Thus the law takes judicial notice of the inclination of tigers to attack human beings and of cattle to eat growing crops. It won't do you the slightest good, if you own a tiger who has mauled somebody, to claim in court that you didn't know he would bite—the law will say you did know it—or to deny you knew that **your** cow would chew up your neighbor's corn if she got into his field. The cases even go so far as to hold that it is common knowledge that it is natural for horses to kick one another, for a stallion to kick and bite a mare, for an elephant to trample a man.

But on the other hand—and observe this carefully—they have held that it is not natural for a horse standing upon a public highway to kick a passer-by or for a bull to attack a human being or—and this is what presumably most interests the reader—for a dog to attack a man or even another dog. No, the law says dogs are naturally gentle, loving, and obedient. It refuses to give any dog a bad name—to start with. It treats him with politeness and consideration and presumes that he is innocent-minded. "The law takes notice that the dog is not of a fierce nature, but

rather the contrary," they said in *Mason vs. Keeling* [1710], 1 Lord Raymond 601. Which, as we all know, Lord Coleridge formulated rather neatly in "Every dog is entitled to one bite," the phrase being varied in sheep countries to "Every dog is entitled to one worry." In a word, once the species of your animal is established as gentle the doctrine of *scienter* makes its appearance, and your particular animal is presumed to be harmless, or, at any rate, that you did not know that it wasn't.

The *scienter* idea was so popular with the bench—most good people, including judges, being dog owners—that they overworked it a bit in the earlier cases. In one of these (*Beck vs. Dyson*, 4 Camp., 198) back in 1810 it was clearly proved that Mr. Dyson's dog, which had bitten Mrs. Beck in the calf of her leg, was generally savage and usually kept tied up. But they nonsuited Mr. Beck all the same and threw him out of court, on the ground that he had failed to prove *scienter* upon the part of Mr. Dyson. Indeed the House of Lords pushed it so far in the case of a dog which had worried sheep (*Fleming vs. Orr*, 2 Macq., 14) that an act was passed in Scotland doing away with the doctrine of *scienter* in sheep-worrying cases entirely. This act afterward became the law of Ontario (R. S. O., c. 214).

But now let us twist the thing around and assume that, instead of owning the biter, or bitor, you are the bitee. How will you establish in court that the owner of the palpably vicious beast that nipped you in the breeches knew that the animal was carnivor-

ous? By proving that other people thought the dog was bad? No. By proving that the owner kept him chained? No. Or that he had put up a sign "Beware of Dog"? Oh, no! Why, it has been solemnly held in the Court of Queen's Bench that even an attempt to kill a goat will not establish such a predilection for attacking a man as to charge the owner with *scienter*. (*Osborn vs. Chocquerd*, 2 Q. B. [1896], p. 109.)

No, you can establish *scienter* only by showing that the dog has actually at some former time attacked a man, to the owner's knowledge—generally something of a job. One might almost expect, so far has this convenient principle been carried in certain jurisdictions, to find that, if a dog should bite you and the meal disagreed with him, you would be obliged to pay damages to his owner; although Goldsmith in his elegy does not state that such was the legal consequence in the case of which he sang, wherein

"The man recovered of the bite,
The dog it was that died."

But now let us assume that *scienter* is proved against the dog owner. What then? Alack! Then indeed all is over! For, once establish *scienter*, the owner becomes thereby absolutely responsible for the dog's acts; the injured party does not even have to allege negligence on the part of the owner; and it makes no difference when or where the act was committed or whether the animal was wild or tame.

So the Supreme Court of the United States held, in the case of the Congress Park, Saratoga, buck which attacked and injured a young lady visitor, that "whoever keeps a dangerous animal of the class *feræ naturæ* with knowledge of its dangerous propensities is liable to one injured thereby, without proof of any negligence or default in the screening or taking care of the animal." Let your dangerous dog escape, and he can go biting down the valleys wild, chewing cat and munching child—at your indefinite expense!

Has then the *scienter*-proved owner rights as well as liabilities? None worth mentioning! Indeed the courts have gone so far as to say that "a dangerous dog running at large is a common enemy and nuisance, and his destruction is justifiable, though not necessary to prevent any mischief impending at the moment." Generally speaking at least, any one is free to kill a dog to prevent injury to himself or his beast—unless perhaps that beast also be a dog, in which case there's a question. The law on dog fights is rather a mix-up.

When a dog is known to be dangerous the owner cannot escape liability for his acts merely by keeping him upon his premises; and if the dog bites a visitor, even if a trespasser, the owner will be liable in damages, although in general one who keeps a dangerous animal on his premises owes no duty to a trespasser except to warn him. When the trespasser has an evil motive he may not recover against the owner if attacked, but the mere fact that a boy

or naturalist or pedestrian has no business upon the property and is technically a trespasser is really no reason why he should be bitten to death by a savage dog. The point is that you can use such reasonable force as is necessary to put a trespasser off your land, but you are not justified in setting a trap for him, such as a spring gun, a pit or a ferocious animal.

Just where a tramp stands is doubtful. In England a beggar who is bitten by a dog belonging to the establishment has been held to have no legal cause for complaint (*Sarch vs. Blackburn*, 4 C. & P., 297), but the rule varies in different jurisdictions, and American tramps have been held sufficiently innocent to be entitled to ask for a handout without being attacked.

But these cases relate only to dogs known to be vicious, and since none of us, of course, imagine that our dogs are otherwise than sweet-tempered let us pause for a moment and consider the position in which we find ourselves. Shall we allow dear old Cæsar to run at large with the chance that some one may lawfully put a bullet through him? What, so to speak, are Cæsar's rights to indulge in his natural propensities? Are we to take all the fun out of a dog's life? No, a thousand times no! sayeth the common law, which looked and still looks upon him as a trespasser with indulgence, if not amusement, in such jurisdictions as it still obtains.

Indeed the first thing to strike us as we paw the ancient dog's-eared tomes of animal law is this leniency toward canine trespass. It is true that if a

dog owner is himself a co-trespasser he is liable for all his dog's misdeeds. But in the case of the ordinary well-disposed, amiable but curious dog—shall he make his owner liable for pecuniary damages every time he trots across the boundary at sight of a cat or other dog? No; the common law in its wisdom recognizes the undeniable fact that dogs are like that. It early took the very sensible position that if a man did not have such property rights in his own dog that he could charge another with stealing it the law would not make him liable in damages if that same dog trespassed upon that other man's land.

The point—a technical one—really was this: A trespass in law gave the person whose land was trespassed upon a right to sue, irrespective of whether the trespass resulted in any damage to the property or not. It was a protective action, guaranteeing the integrity of one's property. To constitute a trespass there must be merely an entry—a physical interference with the plaintiff's land. No damage need be shown. The owner of an animal at common law had an absolute obligation to keep his animals where they belonged, independent of any negligence. The courts said: "The owner must keep them at his peril or he will be answerable for the natural consequences of their escape and it is a trespass although no intentional act."

But in the case of dogs Lord Holt—doubtless recognizing the interminable litigation that might reasonably be expected to result in the event of a differ-

ent ruling—declared that the liability for trespasses of animals should be limited to beasts in which the defendant had a valuable property; and although this was a mere dictum, as lawyers say, it has been accepted by many courts as a correct statement of the law. "If," said he, "any beast in which I have a valuable property do damage in another's soil in treading his grass, trespass will lie for it; but if my dog go into another man's soil no action will lie." The landowner was relegated to the customary remedy of chasing the dog off.

Other courts have declined to accept Lord Holt's dictum and have held the owner of a dog to the same responsibility in trespass as attaches to the owner of an ox or horse.

Really the distinction is hardly worth talking about except as indicating a certain reasonableness in the law, for if a dog is trespassing the doctrine of *scienter* is held not to apply (*Lee vs. Riley*, 18 C. B. N. S., and *Ellis vs. The Loftus Iron Works*, L.R., 10 C.P.) and the master is liable for the actual damage done by his dog, except, apparently in England, for the killing of chickens, where he has no responsibility unless he knew that the dog had the chicken habit. Mind you, this is all under the common law, and the rule only where there are no statutes specifically relating to the matter, which in fact there are in many, if not most, jurisdictions.

Generally speaking it is the law that you can do whatever is reasonably necessary to protect your property against a trespasser, even if that involves

the killing of a dog engaged in the destruction of a sheep or fowl, but you are not entitled to kill the valuable animals of a neighbor simply because they are trespassing in your land, even if they do it habitually and you have warned the owner and threatened to kill them. Your remedy is to impound the animals and sue for damages.

But of course the minute a dog becomes a nuisance you can take more vigorous steps against him and even deprive him of his life. So that's another question! When is a dog a nuisance in the eyes of the law, and not simply a plain, wandering, ordinary dog? Well, that depends. The best thing to do before shooting a dog is to consult a lawyer.

In the case of *Bowers vs. Horen* (93 Mich., 420) there was a dog who used regularly to prowl around the defendant's house at night, chase his cats into the trees, and bark. One morning the defendant's wife found the dog—or, at any rate, she thought it was the same dog—in the henhouse, and one egg broken. Shortly after, the defendant having just painted his back porch, the dog on one of his nocturnal rambles tracked it up, which was more, apparently, than the defendant could stand. So he got a pistol and shot the dog. The court held he had no right to do it. A clear case of caninicide! "You might as well," said the judge, "shoot your neighbor's horse who [*sic*] was trespassing." That "who" stamps that judge as a wise and upright man, a Daniel come to judgment.

And yet only three years before that (Hubbard

vs. Preston, 90 Mich., 221) the same court said that where a trespassing dog collected together a lot of other dogs and brought them to the defendant's lawn, where they proceeded to make night hideous, he had a right—so long as he didn't aim at any particular dog—to shoot one to abate the nuisance! Is not the law a wonderful science? A dog can track up your fresh paint by himself, suck your eggs, and tree your cats with midnight clamor, and you may not take his life; but if he invites others to the party you can slaughter as you will—provided you don't take aim! And the reason? Simplicity itself! A bunch, gang, pack; or whatever you call it, of dogs barking together is a canine conspiracy, and many things legal in themselves become unlawful when made the object of a corrupt agreement or understanding.

The poet would "Let dogs delight to bark and bite, for God hath made them so," but in the eyes of the law a deep chasm yawns between a bark and a bite. Barking is not, so to speak, *malum in se*—that is to say, inherently evil—but becomes so only if an injury directly connected with it follows, such as frightening a horse or giving a woman fits; or when there is a conspiracy to bark, which constitutes a nuisance.

Had the rollicking dog who tracked up the porch in 93 Mich., 420, attempted to bite anybody he could have been slain, provided the slaying was necessary for the protection of the slayer; otherwise, although a trespasser, he could bark at cats to his

heart's content without fear of death; yet had he brought a friend or two with him and done the same thing, or even less, he might legally have been deprived of his life—in Michigan.

And that brings up another point—to wit, what means one may take to protect one's lawn or farm-yard from amiably disposed wandering dogs who merely chance to pass that way. Well, legally all you may do is to construct a high wall entirely about your premises so that no dog can get in, or if you cannot afford that luxury you may employ two or more able-bodied men armed with blunt sticks and nets, who, having warned the dogs off, will, if the latter exhibit no disposition to obey, catch them and place them outside your boundary line. Even if the visiting dog be a fierce, disreputable dog you can use no more force than is necessary to put him off the place unless he attacks you or your own animals. That is to say, good and bad dogs who are merely trespassers are entitled to their rights just as good and bad men are; it is only when they show their naughty qualities by manifesting an active inclination to chew up something that you can go for your gun, or when they come around in gangs conspiring to make sleep impossible.

And do not make the mistake of leaving poisoned meat about or a tray of dog biscuit salted with ratsbane! You can't set a trap for a dog any more than you can for a man, unless that dog be such a wicked dog that he is notoriously a menace to life

and limb. Naturally, if a dog trespasses on your property and eats something which disagrees with him, and even dies, so long as you did not plant it for him his owner has no kick coming. That was settled a long time ago in *Ponting vs. Noakes*, (1894), 2 Q. B., 281.

The reader recalls, doubtless, how every English churchyard has its border of yew. Mr. Ponting, the plaintiff, had a horse pastured in the field next a burial ground, and he—the horse—stretched his foolish head over the hedge that separated the quick from the dead and ate of the yew or yews. Then immediately he, or it, also died. Mr. Ponting claimed that the wardens of the cemetery ought to pay for the horse. But the Queen's Bench said not, and that the horse, although presumably an entirely moral Christian horse, was a trespasser, and that Noakes, whoever he was, did not have to anticipate and prevent strange horses from eating yews that did not belong to them.

You can see how this would be a good law. And turn-about being fair play, in a like case (*Crowhurst vs. Amersham Burial Board*) the English Court of Appeal said that where the cemetery did not keep its yew or yews on its own side of the fence but allowed it or them to creep over into Crowhurst's field, so that Crowhurst's horse ate of it and died, then, that the cemetery owners did have to pay for the horse—because this time the yew and not the horse was the trespasser, and the wardens, directors, curators, and so on, should have kept their yew

where it belonged and should have known that, if it got away, out of bounds, any normal horse would at once naturally have selected it as a *hors-d'œuvre*.

But suppose that instead of planting a yew tree you have wisely procured a watch-dog to guard your message.

“’Tis sweet to hear the watch-dog’s honest bark
Bay deep-mouth’d welcome as we draw near home;
’Tis sweet to know there is an eye will mark
Our coming, and look brighter when we come.”

Further, let us assume, not the coming of us ourselves, personally, but of some strange visiting dog, to be the cause of his brightening eye, and that this illumination of his iris will immediately be followed by a growl of invitation to battle. What are the rights of the respective dogs under these circumstances? What are the rights of their owners? Where do we come in? Should we come in? Or, if we come in, how may we best get out? This, from many points of view, is a dangerous subject. The law on dog fights is, as we have intimated, confused and unsettled.

There seem to have been more dog fights in Massachusetts than anywhere else, and the Supreme Court there has given much attention to such contests and the proper rules pertaining to the same. Starting with the fundamental principle that the law has no respect “for the prejudices and character of dogs” (*Boulester vs. Parsons*, 161 Mass., 182), the court has decided that before you mix up in a dog fight

the circumstances must warrant your interference, in which case you must exercise due care, or, the other way round, must not be negligent. It is not negligence contributing to one's injury if you, being the lawful custodian of a dog, for the purpose of rescuing it and preserving the public peace, grab its opponent by the collar, but it may be negligence if under precisely similar circumstances you mix into the rumpus, and, the winning dog having no collar on, you grab it by the tail and get bitten (*Raymond vs. Hodgson*, 161 Mass., 184). These are all questions of fact for the jury, and the jury will be largely influenced by its personal experiences with dogs. There are as many kinds of jurymen as there are dogs; and almost as many verdicts.

We have dealt thus fully with the law of dogs, first, because one is likely to need it in his own business, and, second, because there is more of it and hence it is best available to illustrate the general laws governing animals. But it is peculiar law—*sui generis*, as they say—for the reason that dogs and other animals are the only sort of private property that has a will of its own and the ability to carry it out. Considering the difficulty of looking into an animal's mind, it might at first appear that the question of whether or not it intended to return to its master would present difficulties. But no! That is merely a question of fact for the jury, and juries, being men of wide experience, can tell at a glance whether a sea lion has gone for good or merely out for a short swim, or whether the dove if left to

itself will return to the ark. Which brings us to birds—and thence to cats.

There is not much bird law and, singularly enough, considerably less regarding cats, which, in spite of and apart from the Welsh code, heretofore quoted from Blackstone, seem to have been originally held in even less esteem by the common law than dogs. Dogs improved their position before the law long before cats did. Even to-day the law respecting them is doubtful and difficult of application, for their habits are unreliable and often uncommendable, and their ownership hard to prove. Often two families think they own the same cat, which turns up only at sporadic intervals, depending perhaps on the quality of the milk and the regularity of the milkman. "Oh, the cat's come back again!"

Can you own a cat without knowing it? Who owns the cook's cat? And if a strange cat has kittens in your cellar, whose are they? Certainly, cats are vastly more unreliable than dogs—baser property in every way—harder to control, and natural thieves and nuisances if left to their propensities. As we have seen, the courts differentiate between a dog that bites and one that merely barks, but we have found no cases making a similar distinction in the case of cats, and it is said that if a cat screeches nightly on our backyard fence we may lawfully kill it. Nevertheless the court will guard and zealously enforce an owner's rights, once ownership is established, even if it be a joint ownership.

In the comparatively recent case of *Harris vs.*

Slater, in the Chancery Division, one old maid had given a blue Persian kitten named Roy to another old maid to look after. When Roy grew to cathood he became, as befitted his name, a great, celebrated, and regal cat. The second old maid—who had reared Roy and cared for him through the precarious age of adolescence—entered him in the Crystal Palace cat show under the names of both herself and her erstwhile friend, but later on claimed that she alone had the right to him. An acrimonious litigation ensued, at the conclusion of which the Lord Chancellor himself declared a partnership to exist between the two old maids, and issued an injunction restraining the second old maid from selling Roy or otherwise making use of him in derogation of the rights of the first old maid.

It is rather astonishing that there is not more cat law in a country where cats and mice have played so large a part in literature and where once at least every wife had seven cats and every cat had seven kits.

It is difficult to prevent a dog from trespassing; almost impossible in the case of a cat. Hence the law regards your responsibility for your cat's trespasses leniently and allows a wide discretion in the means employed by your neighbor to protect himself. In effect a cat, bird or dog owner, if he allows his pet at large, takes the risk of its getting into trouble with its natural enemies, even on his own property, if such risks could have been reasonably foreseen. There is a famous Scotch case where a cat killed a carrier pigeon on a roof strange to both

of them. The owner of the pigeon sued the owner of the cat for damages.

The court said: "The cat is more a domestic animal than the plaintiff's bird. But there are no obligations on the owner of a cat to restrain it to the house. The plaintiff's plea is that the natural instinct of the feline race is to prey upon birds as well as mice. So it was argued that the owner of the cat should prevent the possibility of its coming into contact with its favorite sport. But it is equally true that the owner of a bird should exercise similar precaution to prevent its coming within range of a hostile race." The defendant was acquitted (*Webb vs. McFeat*).

Many interesting problems have arisen out of the desire of the owners of animals to provide for the latter in their wills; and although the courts are somewhat loath to permit needy relatives to starve while cats and dogs live in comfort, they recognize the accepted fact that even what seems an excessive love for dumb animals is no evidence of mental instability. It has been judicially held that it is no indication of insanity to provide a multitude of cats with regular meals, served at table three times a day, and to furnish them with plates and napkins. Of course an animal cannot be the direct recipient of a legacy, for it can have no ownership in property, although the English courts have gone a long way in upholding such legacies as trusts, a striking instance of which is given in "*Proffatt on Wills*":

"I bequeath to my monkey, my dear and amus-

ing Jacko, the sum of ten pound sterling per annum, to be employed for his sole use and benefit; to my faithful dog Shock and my well-beloved cat Tib, a pension of five pound sterling; and I desire that in case of the death of either of the three, the lapsed pension is to pass to the other two, between whom it is to be equally divided."

Where a testator desires to provide for particular animals after his own death he must be careful to create a valid trust, and one not in violation of the law against perpetuities or other statutes. In this connection it should be noted that in those jurisdictions which limit the duration of a trust to a certain number of lives, the lives selected to measure the trust must be human lives and not animal lives. In other words, you cannot put money in trust to be used for the benefit of certain animals during their lives; but the trust can continue only during the number of human lives permitted by law. Otherwise the law might be defeated by selecting, for the measuring life, a turtle or a parrot! "Where the law permits a trust to continue only during one life in being, can," asks Professor Gray, "a gift ever be made to take effect upon the death of any animal however longevous—an elephant, a crow, a carp, a crocodile or a toad?" The law may be dry, but occasionally it can be picturesque! The reason may be that where the law, as in New York, allows a trust for only two lives, by naming two cats a testator might be held to have created in fact a trust for eighteen lives!

But even if the trust is technically valid so far as its duration is concerned, there is a limit to the patience even of the law, which, though it once prosecuted bugs, birds, and beasts, will to-day refuse to carry out frivolous and trifling testamentary instructions such as "to feed sparrows forever." There is a point at which softness of heart indicates a similar condition of the brain. After all, Christian civilization proceeds upon the theory that human beings are of more value than many sparrows.

X

MARRIAGE AND DIVORCE

INTRODUCTORY

The following syndicated articles on marriage and divorce have aroused so much excitement and resulted in such a deluge of correspondence as to lead to the conclusion that most people who marry make no attempt to inquire into the nature of what they are doing or have done until after the ceremony, if then. The two letters received shortly before this book goes to press and printed herewith are illustrative of the general attitude of mind.

*Topeka, Kansas,
Nov. 22, 1924.*

Mr. Train :

I have read several of your articles such as "Human Nature on the Witness Stand" and "Law and Love in Marriage" and would like to read one of your articles on the subject of

"Is a girl 18 years old as much to blame as a man for her condition, should such be the case?"

Very truly yours, _____

*Savannah, Ga.,
Aug. 4, 1924.*

Dear Mr. Train :

There is some information regarding my married life that I would like to ask you, but first I prefer to be properly admitted to do so, and you will please advise me to that effect. This is the results of a slight glance at your weekly artical in the Sunday's issue of the Savannah's Morning News Paper, and the reading have created within me a great desire to know somethings about married life, "Especially Mine."

*I hope to hear from you very soon even though this may be absolutely contrary to your custom, however Please let me hear from you in some way. I Thank you very kindly,
I am,*

Respectfully yours,

X

MARRIAGE AND DIVORCE

§ 1

THERE are two critical periods in married life, the first within a few years after marriage, and the second about fifteen years later, when the children, if there are any, have reached an age when they do not have to be hand or milk fed, and are able to kick out for themselves, or think that they are. Family lawyers, doctors, and clergymen usually agree that the matrimonial almanac should contain some such item as: "25-30 years—Thunder storms and squalls may be expected about this time. 40-55 years—Long spell of humid weather with large area of low depression."

Of course in any long cruise, matrimonial or other, all sorts of dangers will be encountered, sharp ledges, rapidly shelving shoals, and always "doldrums," in which the ship of marriage sometimes gets becalmed for good; but from a fairly good observation point, with an eye screwed to the professional spyglass for over a quarter century, I should say that, where a young couple get safely by the first period of adjustment, they can count on a long cruise, not without its occasional annoyances and discomforts, but without any real men-

ace until nearing port again—a long cruise, and a good cruise, even if their venture did not make them rich in anything save human experience. As the old Nantucket captain, back from a three-years whaling voyage, is reported to have replied to a question regarding profits: “Wall, we didn’t get much ile—but we had a damn fine sail!”

Carrying out our nautical figure, there are two dangerous headlands to be weathered before making harbor, Cape Disillusion and Cape Discontent. They loom high and precipitous, they are surrounded by rocks, toward which the current swiftly draws every passing vessel, if the wind be too light to fill the sails.

It is hard to say which is the more dangerous; the first is the more easily discernible to the naked eye; the second is apt to be obscured by the fog of habit. That the early years of married life are hazardous there can be no doubt. I know a couple, married now about ten years, and therefore well by the earlier danger point, all of whose ten bridesmaids and ushers have since been married and divorced. Such a perfect batting average is probably unusual, but at nearly fifty years of age, I find that more than half of my more intimate friends, who married when I did about twenty-five years ago, have been divorced.

There are probably special reasons in both these unfortunate illustrations; too much money and leisure in the first; the war and the jazz era in the second. But divorce is now so prevalent as to de-

stroy any idea of permanency in marriage. No longer does a man, in the words of a celebrated Lord Chancellor of England, "take a woman for life and not for years." More likely he takes her, or she takes him, on a sort of "tenancy at will"—without any feeling of responsibility to God or to the state. There is no ballast and no headway to the ship. It is hard to steer. And half the time the couple never had any intention of really going to sea at all. I am not concerned here with that kind of people.

Now when the matrimonial ship goes aground or piles up on the rocks, it is usually because the captain and the mate did not take the trouble to lay a proper course or make any adequate study of the charts. Most people marry simply because they "want to get married"—which of course is the best reason in the world so long as they marry the right person. They embark on the theory that it is a pleasure cruise, instead of a round-the-world voyage, a joint adventure, undertaken for profit and subject to the supervision of the state throughout its continuance, since its dividends are paid in citizens, and one in which, if all goes well, business becomes pleasure, and pleasure the most perfect happiness to be found this side of paradise.

Youth is rightly the age of romance; without romance life would not be worth living. True love, the supreme unselfishness, is diametrically opposed to calculated self-interest. But although love may be blind, it must not be permitted to become a

suicidal mania. Just as the truant schoolboy sees in the shabby schooner loading at the wharf an argosy, bound for perfumed lands, through blue and sunlit seas, shortly to return laden with "gold and silver, ivory and apes and peacocks," so a few years later he idealizes the girl who "dances like a dream" or for any other equally good reason seems to him a "knockout," into a beautiful and mysterious being, superior to the ordinary limitations of human nature, with whom he believes himself in spiritual rapport because when they gaze together at the midnight stars they mutually experience an unsatisfied yearning for something or other. The lure of the infinite is in reality a less reliable bond than a mutual taste for fried eggs.

It is right that men should idealize women. Dreams, and dreams alone, chart unknown seas and conquer the poles. Yet most women are neither saints nor houris, and there is in every married life a moment of disillusionment, when to one or both comes the realization that what they have embarked upon is not simply a pleasure cruise, and that one mate or the other, however well recommended or polite on shore, has idiosyncrasies of character and deportment utterly unsuspected. If they are genuinely fond of one another, they quickly adjust themselves; but if they find that in reality their souls are strangers, in spite of their mutual yearning for infinity, and that they are so antipathetic that life together seems a dreary outlook, then after a few years of vain attempt at harmony

they seek marital freedom, particularly if they have no children. Or, on the contrary, it may be apparent that there has been a genuine mistake—on both sides, perhaps. In most instances, however, it is more likely to be a case of finding that the article is somewhat different from the advertisement. It really couldn't be "just as good." Nothing ever is—including a man or a woman.

Even where there is a rather rude awakening, if held together by religious scruple, mutual love of their little family, or dislike of the vulgar notoriety usually connected with divorces, the young couple may develop a new and genuine affection based on a sound knowledge of one another's actual character, which in the end will be stronger and more worth while than their first efflorescent passion. In other words, they fall in love or come to be in love with real people instead of imaginary ones. And these real people often prove to be very, very fine! Human nature is the most admirable thing as yet created. Most of them, being nice girls and boys, with sound ideals of decency, loyalty, and kindness, do weather the Cape of Disillusion and get fairly started on life's long cruise; and many of them, I am glad to say, pass it at such a distance that they are not even aware of its existence.

Then, as it is called, the young couple "settle down," and as they settle they perhaps begin to sow the seeds that at forty or forty-five will blossom into the nettles and burdocks of love's garden. For that is when the crop is harvested; the chickens

come home to roost. The trouble begins when they become more interested in their material success and position in the world than in their own family life and what it should stand for.

They want too much and so can never have enough. They have the same yearning that they experienced when gazing at the constellations, but now it is for a bigger house, more servants, a new motor; the wife wants to get into a more fashionable circle, wear smarter clothes, go to Palm Beach in winter, Paris in the spring; the man does not really care so much about these things, but he wants to be known as a success and to keep up his end. This often becomes practically an obsession.

In almost equal ratio as he succeeds in business, he ceases to be either a friend or companion to his wife. Without realizing it, he becomes a draught animal, often too tired when he comes home at night even to be polite. They began by wanting \$5,000 when they had \$3,000—now they want \$20,000 instead of the \$12,000 they have. In the beginning the wife, realizing that he was working for her, or at any rate believing him when he said that he was, did all she could to make him comfortable and amused on his return home; she dressed herself as prettily as she could, tried to be entertaining, proposed things for them to do together.

This lasts for a while—until she discovers that he is too tired to be amused, or go out, or pay much attention to her. He answers in monosyllables behind his paper. She suppresses a sigh of disappoint-

ment, and they go to bed at ten o'clock. Their children are at school.

Well, they are now forty-five and forty-three respectively. Their Jack is engaged to a charming girl. Their Jill is nearly old enough to go to college or get married. Both secretly regard their parents as rather stuffy worldlings, who have lost all sense of romance. In this they are pretty nearly right. The wife, although she has prodded her husband into the money hunt, does not see that the money lands her much of anywhere, after all. She cannot get what she wants either socially or any other way, the reason being, ironically enough, that her husband has ceased to be anything but a money grubber. Nobody wants him at dinner. He can only talk dry-goods.

Life, then, becomes flat, stale, and unprofitable. What is the use of taking any trouble about one's appearance for a man who doesn't change his clothes, and half the time doesn't shave? She "lets herself go," and then everything goes. She takes no thought about what she shall eat, or drink, or wear. Sufficient for her day is the evil thereof.

She slumps, lets herself grow fat, gets careless about her hair; or if not, she does it to attract some other man than her husband, some man who has more time to make himself agreeable. Her interest in him is probably wholly innocent at the beginning; but after a few months she finds on looking back that, whatever fun she has had, has been in the society of her new friend.

He has been the one to walk, talk, read with her, take her out to dinner, to the play, or to the movies. It is he and not her stodgy, grumpy husband who has brought color, interest, and pleasure into her drab life. And so one particularly fine day, she—who has doubtless been vehemently opposed to divorce all her life—suddenly asks herself, since the children no longer need to be particularly considered, why she should not live the rest of her life with the man who means most to her.

And her husband? Perhaps with equal suddenness he has begun to wonder what it is all about, anyway? For what has he gone downtown and slaved every day for a quarter of a century? To support a dull and frowsy woman who is too lazy to put on a fresh frock in the evening, or is always gadding about with another fellow? The children are practically grown up. They have, or could have, homes of their own. They don't need him any longer. He sees youth vanishing over the hill and he pulls down the roll-top and goes puffing after it as well as he can.

Often he doesn't mean to do anything wrong. It is just a despairing gesture. Is he so old, so unattractive? And then some pretty little stenographer smiles shyly at him, and he twirls his mustache and swells with pride. Romance again!

Very likely he is guilty of no greater indiscretion than surreptitiously taking the young lady to the theatre or out to supper. Just a belated temperamental flurry. But he forgets that he is a well-

known person whose movements are apt to excite notice, and one day, when he goes home to dinner, his wife meets him with compressed lips and a glint in her eye. Or perhaps she is not there at all!

Or—a frequent occurrence—the stenographer's elder brother, or some gentleman masquerading as such, calls with an invitation to pay over \$5,000 unless he wants to be made the defendant in some sort of a mysterious action, for breach of promise, or breach of contract. The Bible admonishes us to avoid the "appearance of evil." Failure to follow this excellent free advice has cost thousands of men many millions of dollars. It is not so much what they have done as what the world thinks they have done, that costs money. The romances of elderly men are apt to have a good deal more smoke than fire; and often their "stravagalings" are due less to a revolt against the marriage tie than against growing old. But, since we all have to grow old, there is always Cape Discontent to be weathered.

If we are wise mariners we shall lay a course that will take us safely by and so conduct ourselves that there will be no mutiny. The suppressed irritation that discolors the whole marital relationship and finally explodes in the divorce court, often starts with some trifling, but annoying, personal habit, such as sniffing. The sniff, or something equally unimportant, is responsible for many disrupted homes. We forgive the sniff of the houri with whom we are madly in love. To sniff, we concede, is human. But a sniffing wife is another matter!

Probably our reference to it lacks gallantry. Anyhow, it is not loverlike. At best our manner is not ingratiating and hardly calculated to induce a desire for co-operation. Besides, we may sniff ourselves occasionally. Well, ten years of continual sniffing will wear any man's nervous system to a frazzle. It has, I believe, been construed in some jurisdictions to be the equivalent of cruel and abusive treatment.

Lack of elementary politeness, which may develop in the course of years into rudeness or even violence, is a fertile—I was going to say, the most fertile—cause of divorce. And impoliteness steals upon us so imperceptibly! Why is it that so often, once he has married her, a man no longer feels it necessary to be courteous to his wife? Must he not realize that she will eventually be forced to one of two conclusions if his manners toward her undergo a change—either that his feelings have changed also or that he was not the gallant gentleman that she thought?

The trouble is that men and women too frequently marry not only without friendship but without knowledge of one another. Husbands and wives must be friends as well as lovers—and they must continue lovers to the end. If some youthful client, of, let us say, twenty-five years—one who had got safely by the first critical period of marital history—should ask my advice as to how to make sure of permanently retaining his wife's affection, I should probably say:

"Treat your wife at least with the same courtesy that you would accord to a prospective client or customer; don't hum or whistle in her presence; don't expect her to take your affection for granted—why the devil should she? Give her occasional evidence that she is in your thoughts, other than on Christmas and her birthday; remember that her good-will, if nothing more, is the most valuable single asset in your life's bank account; take your pleasure with her rather than with anybody else; don't let her get lonely; make every meal you share with her a party; tell her you love her at least once a day; keep your eyes in the boat. Easy? Yes, if you start that way and keep it up."

The number of divorces in the United States would decrease fully one half, in my opinion, and probably more, if married couples realized that the load that breaks the back of the matrimonial camel is, more often than not, composed of the straws of petty annoyances. Many a wife might condone a single infidelity who could not bring herself to forgive a systematic coldness or constant indifference. It is said that a woman can always understand how a man can love another woman more than herself—so long as he loves her. The unforgivable sin from her point of view, is that she is no longer loved.

§ 2

What is the matter with modern society? Will our present western civilization decline and fall like that of Babylon and ancient Rome? Those who seriously

believe our social structure in danger of decay, if not of collapse, usually cite as their chief reason the prevalence of divorce.

How far does the ease and prevalence of divorce tend to undermine American home influence? Nobody knows. Who can say which is the greater of the two evils: to bring up a family in an atmosphere of incivility, sarcasm, aversion, and hatred; or to dump them into boarding schools and shunt them about the rest of the time from parent to parent without permanency and continuity in their lives? The answer is bound to be personal. It depends on the parents and on the children—upon all the circumstances. Tolerance is needed in most homes, and parents ought to exercise the limit of self-control for the sake of the children. Yet it is not enough to say that a home is a home and let it go at that. Many a home is no home at all or worse than a home—from the point of view of both the child and the state.

The question of divorce is beyond any doubt one of the highest concern, since it affects the integrity of the units of which society is composed. But the prevalence of divorce does not necessarily indicate the weakening of moral standards or the collapse of the social order. On the contrary, it may indicate a high-minded refusal to overlook a marital incontinence condoned in other countries or in other ages. The important question is not so much how many divorces there are, but how much immorality there is. The number of divorces cannot tell us that.

"But," says some one, "wasn't there the same freedom of divorce in ancient Rome—and didn't Rome fall?" The same? Heaven defend us! There never was anything like the flagrancy of Roman divorce since history began! All a man had to do was to hand his wife a note telling her to go home to her father and off she went. He could divorce her before breakfast, so to speak. He could do the same thing with respect to his son's wives. Marriages in the ancient world were regarded as alliances merely—made and unmade to suit the political exigencies of the moment.

Personal beauty was a factor unconsidered. A man stayed with his wife only so long as his father thought it a good thing; or, if his father was dead, so long as he himself thought it a good thing. He could not only put away his wife, but he could marry her to another at will. As distinguished a Roman general as Tiberius was forced to surrender his wife Agrippina after a long and happy union because ordered to do so by his uncle Augustus, and everybody, including himself, while regarding it as hard luck, as a matter of course assumed it to be reasonable and wise—for what?—*the sake of the family!* The identical reason that we of to-day are so opposed to divorce!

For from ancient times, and even until comparatively recent times—the family—that is, the clan or tribe—was an organization of great political and economic importance. You were born into it and you stayed in it until you died. And you conducted

yourself in whatever way seemed most to further its collective interests. Hence the "alliance-marriage," and the necessity for easy divorce—the "writing of divorcement" of the New Testament, in order to facilitate such alliances as might seem desirable. In those days a woman used to wander around from house to house changing husbands as easily as a man goes from one club to another.

Did Rome fall because of easy divorce? Of course not. Such an idea is as absurd as to say that Rome attained its enormous power and influence because of easy divorce. Or that it fell because the Romans drank wine or ate red meat. The ease of divorce itself had nothing to do with it—one way or the other.

But however antipathetic in these modern days the idea of autocratic dictation on the part of a parent regarding marriage or divorce may be, there is one aspect of the matter in which we might as well preserve a leaf from the book of ancient Rome.

In those days a wife must not only be, but have always been, a respectable woman, and if she had not been a respectable woman she could not become a wife. No unmarried woman of loose morals, no married woman who violated her marriage vow, could gain "a character" by marriage. With us if a woman can tease a man into marrying her, she becomes at once, for general purposes, socially immaculate. Not so, in ancient Rome. A woman was either respectable or she was not, and a mere marriage ceremony could not make her so if she was not.

She would still be exactly what she was—a *concubina*. No formality could make a legitimate wife of her, whereas no freeborn woman of irreproachable habits could live with a man otherwise than as his legitimate wife—no formality before a magistrate was required. This was the basis of the expression to the effect that “Cæsar’s wife must be above suspicion.” She was. So was the wife of any Roman. She was a wife because she was above suspicion.

The absolute freedom of Roman divorce was succeeded by an ecclesiastical prohibition equally absolute. When divorce was allowed at all the language of Saint Paul was made the basis for a rigid requirement of what is known as “the statutory ground.” But if there were few or no divorces there were plenty of “annulments” for lack of capacity owing to youth or corporeal disability, insanity, polygamy, consanguinity, affinity, or fraud—which covers a multitude of sins both before and after marriage.

Frankly, there is as much opportunity for legal hocus-pocus in annulment as in divorce, a fact not always appreciated by those who hold up to our admiration the rugged virtue of non-divorcing countries. The wolf of divorce often masquerades under the sheepskin of annulment.

The rigidity of the Middle Ages still persists in the English law of divorce, which does not recognize adultery on the part of the husband as of itself a sufficient ground, although it does on that of the woman. Moreover, the English courts do not recognize the legality of divorce obtained against an Eng-

lishman by his wife, outside British territory, for any cause whatever.

And they have another little joker in their "ward-in-Chancery" procedure, which permits a father to deposit a few pounds to his children's credit in the office of the Lord Chancellor, who thereupon, without further action on the part of anybody, become his wards and cannot be lawfully taken out of the jurisdiction of his court without his permission. This gives any rascally English husband the whip-hand over his American wife, if there be children of the marriage, for all he has to do to keep her safely anchored in England is to send his check for £50 to Chancery; and he can break the Seventh Commandment at will so long as he be not guilty of cruelty toward her as well.

This procedure has been resorted to time and again to blackmail American fathers. "The children are wards in Chancery now!" the husband says to his helpless wife. "Go back to America if you like—but the children *stay* here!" More than one plucky American girl has kidnapped her own children, and defying the Lord Chancellor, the sheriffs, bailiffs, constabulary, yeomanry, and all the rest of the king's men, smuggled them out of England.

We Americans, of course, regard this as showing the proper spirit. Successful revolution, perhaps! But certainly we ought to take no pride in the guerrilla warfare that goes on between parents whose relationship to each other remains in a cloud of obscurity by virtue of contradictory decrees, and

each of whom intends to gain the physical custody of their unfortunate offspring by hook or crook—usually crook. The result is that some children never go out to play in the park except under heavy guard and are the victims of holdups and shooting affrays that outdo the “wildest dreams of Kew,” all of which makes exciting newspaper reading but causes us to wonder a little what century we are living in.

The Romans realized what we do not, that laws cannot make morals, but are only the expression of them, and, being products of legal machinery, are apt to be delayed expressions at that. Beyond a certain strain the camel's back breaks and so does the tie that binds two antagonistic human beings in a union distasteful to both. They will divorce *de facto* if not *de jure*. Where it means spiritual death let us not penalize two human beings by imprisoning them for life, without good cause why they should not be put asunder. But let that sundering be only for cause, and just cause.

To-day divorce has become almost as easy as marriage itself and hardly more costly. States vie with one another in offering inducements to those who seek marital readjustment, conniving with collusion and averting the judicial face from the most blatant fraud. Anything goes. Mrs. A gets on a train, leaving Mr. A at home, spends a few months in a Western town and, having contributed to the support of the local business institutions, is given a divorce, good almost anywhere, for “desertion” because her husband did not come with

her. Usually Mr. B is waiting to meet her in Chicago. If the cat of desertion will not fight, there is always "cruelty," "abusive treatment," and "assault" (neither necessarily more than verbal), and as a last resort good old "incompatibility."

It is still possible for any disgruntled American couple to go to Paris, stay there only for a few days over three weeks, and, by appearing before a judge and assuring him that their differences are irreconcilable, secure a decree which will ripen automatically into a final judgment of divorce shortly after their immediate departure for home. It is necessary for them only to allege that they are "domiciled" in Paris at the time of serving the first papers. I have observed that, whatever their point of view in these matters, parties to a divorce action almost invariably have felt that the end justified the means.

Now what is the effect of all this chicanery? Unquestionably it tends to foster a light-minded attitude toward marriage upon the part of the young, as something which need not be taken very seriously, an attitude which results in ill-considered and impulsive unions that are foredoomed to disruption, even if they were ever expected to be permanent, which probably they were not. A girl who is "just crazy" about a boy will decide to "take a chance" or "try it anyhow," aware that, if they do not "make a go" of it, one or both can take a swift trip to Reno or Paris and regain freedom. It is demoralizing, it tends to reduce marriage to a sort

of legalized concubinage, and it destroys the solemnity and dignity of the relationship, upon the permanency and sacred character of which the influence of American family life depends.

§ 3

Marriage, although usually referred to as a "contract," differs from every other form of contract known to the law; neither is it a partnership, nor, at least technically speaking, a "joint adventure," although sometimes it may legally become all of these. To-day it is something quite different and, as lawyers say, *sui generis*; for the ordinary contract or a partnership can be dissolved by mutual consent; and the participants in an adventure can back out of it.

Marriage, on the other hand, implies a complete change of *status*, or condition, in which the parties take on an entirely new relationship to society and in which the state, representing society, has an active interest. For by marriage is created the social unit known as "the family," which supplies new citizens to the state and during their minority prepares them for their coming duties. Hence:

The state decides (1) who may or may not marry, (2) the terms or obligations of marriage, and (3) refuses to permit the marriage to be dissolved without its consent.

A marriage is, to be sure, *like* the ordinary contract in that its validity depends on the law of the

place where it was entered into, but it is absolutely unlike a contract in that (1) the parties cannot fix its terms, (2) they cannot, by mutual consent, modify or rescind it, (3) the nature and obligations of their status change with the laws of the State where they happen to be domiciled, (4) damages cannot be recovered for a breach of marital duty, and finally in that (5) the courts cannot compel specific performance.

The only contract in the ordinary sense involved in a marriage is "the engagement." This is a contract like any other contract, although it cannot from the nature of things be specifically enforced in equity. But either party can sue for damages if it is broken; and juries may grant "heart balm" for breach of promise to jilted males who feel that they had been taken advantage of. Some of the weirdest, most amusing, as well as heart-rending cases known to the courts arise out of the confused, complicated, contradictory, and irreconcilable laws governing matrimony in different places; for, as everybody knows, it is quite possible to be legally married to one woman in England, to another in Maine or Nevada.

It is said that "when a man marries his troubles begin." On the other hand, when a man begins to marry and marries more than once it sometimes happens that the more women he marries the less likely he is to go to jail. I once prosecuted a man on an indictment for bigamy which alleged that he had married a woman (A) in New York when *he*

already had a lawful living wife (B) in Chicago. His defense, duly substantiated on the trial, was that (B) *was not his lawful wife*, since when the Chicago ceremony had been performed he already had still another wife (C) in Iowa, which made the Chicago marriage bigamous and void. The third lady, in Council Bluffs, was not an afterthought, but a bona-fide wife, and this strange trigonometrical defense acquitted him on the precise charge in the indictment and for some time postponed the penalty for his uxoriousness.

The validity of a marriage depends solely on the laws of the State or country where it was entered into. "Once married, always married." Otherwise a couple would have to get married all over again in any place they went which did not have similar laws, and every transcontinental pullman would have to carry a parson to keep proceedings regular. The "once-married-always-married" rule is a great relief to the mind; and it would be an excellent thing, in that respect at least, if the same rule held good in regard to divorce—but it doesn't. Once married, any alteration in the status of the couple thereafter must necessarily be governed by the law of the place where they are; otherwise, we should have the interesting spectacle of every State in the Union trying to interpret the divorce laws of every other State. However, the divorce situation is so bad that it could hardly be any worse.

The reason for the mix-up is due to the fact that after the fall of the Roman Empire and down to com-

paratively recent times divorce was regarded as a matter solely for the ecclesiastical courts. Whether this was on the theory that marriages are made in heaven I don't know. Anyhow, if you were dissatisfied with your domestic arrangements you could not get any relief from the civil authorities, but had to seek the co-operation of the church; and as the church was wholly opposed to divorce you perforce had to stick it out unless you could show cause why the marriage should be annulled on the theory that it was not, and never had been, a marriage at all.

The mediæval mind that revelled in studying such abstruse questions as whether the Archangel Michael could commit a crime and, if he could, *would*, or how many ordinary angels could stand comfortably upon the point of a needle, and which held animals legally responsible for crimes, such as a rooster's laying eggs, had no great difficulty in devising many ingenious methods proving that what had universally been supposed to be a legal marriage was not; particularly if the parties concerned were sufficiently influential.

The ancient feeling that the bethrothal was almost equivalent to a marriage gave rise to the logical doctrine of "pre-contract," which undoubtedly was worked overtime. In brief this was that, if it could be shown that A had promised to marry C before he had married B, he was, in the eyes of God, the husband of C, and the marriage to B—although the parties had been jogging on comfortably for years—was no marriage at all. It is probable that many

forgotten promises were hastily remembered; and sometimes also, perhaps, that after A had been relieved from B, he did not take much further interest in C, although usually the doctrine was invoked in order to permit of some political alliance otherwise impossible.

After the American Revolution, since there was no union of church and state in this country, we had no ecclesiastical courts and so for a while no divorce laws at all. Gradually the States took the matter up, one by one, and made such laws as they saw fit, depending, no doubt, upon the personal marital experiences of the legislators. To this we owe our present predicament in which any one who has secured a divorce can never be wholly at ease after marrying a second wife, lest he wake up some morning and find that he is still married after all to the first. There is, I am told, a case of record where a lady went to Reno and secured a divorce from her husband on the strength of which he innocently married again, only to find himself the defendant in another divorce proceeding brought by the same old wife, ten years later in New York, and naming the new one as co-respondent.

The confusion arose out of the unfortunate fact that, in spite of the "once-married-always-married rule," no State is compelled to recognize a divorce granted in another State where it questions the *bona fides* of the proceeding. A divorce, as the saying is, is always likely to be "attacked collaterally." Somebody may bob up at an unexpected moment and

inconsiderately allege that it was all a put-up job, or that the defendant wasn't properly served and brought into court, or that the plaintiff really didn't live there, or something fully as annoying and perhaps true. *Punch's* advice to bachelors is equally applicable to married men—"Don't."

As illustrating the law of place, or, as lawyers call it, the *lex loci*, take the case of the distinguished French diplomat who met an attractive young vaudeville artist in Shanghai, and after a brief courtship accompanied her on a flying trip to Mongolia, where they were married by a Belgian missionary. Later, their temperaments proving incompatible, the diplomat appealed to the French courts to declare the marriage invalid on the ground that it did not conform to the French law, which requires any native of the country marrying abroad to have the ceremony take place either before some French diplomatic official or "according to the usages of the country in which the marriage is performed."

The court pronounced the marriage void on the grounds, first, that the Belgian missionary could not under any interpretation—even the most liberal—be legally regarded as a French diplomat, and, second, that the marriage had not been performed according to the usages of Mongolia, where the only way one could bring a lady into lawful wedlock was by capture or purchase. In this connection it was duly brought out by competent evidence that a fair price in Mongolia for a young wife was from five camels up—but that "an old

widow" would bring as high as thirty or forty camels—a fact worth noting as coming from the neighborhood of the oldest civilization in the world.

This naturally introduces the query, where divorce is under discussion, as to how far woman is still regarded in law as a chattel, or, as it is commonly put, "a slave." The days are over when a woman savored of property and had no rights save those she could exercise by virtue of her fascination. To-day by virtue of "married women's acts" and other relieving laws she is to all intents and purposes under no legal or political disadvantage owing to her sex. Indeed the law, which sometimes tends, after all, to be reasonable, regards her with considerable favor in the matter of the custody of children in the event of a divorce. She is not even obligated to bear her husband's name if she prefers her own. A man may buy a wife, but she does not thereby become his chattel. And if she suffers from any legal disabilities whatever, she by the same token has dower in his property, and can compel support if her master proves unworthy of her love.

All of which, while very simple and wholly elementary, is not known to everybody, although it should be. I cannot imagine any more profitable study for boys and girls than an elementary course in law as applicable to the ordinary affairs of life. Certainly when two young people contemplate uniting their two lives and establishing a family, they ought to have some idea, at least, of the legal as well as the economic, social, and ethical aspect of

what they are doing. If when they enter so lightly into matrimony they realized that, however careless they were themselves about the step they were taking, the state nevertheless viewed it as one of such serious moment that it would never thereafter permit the union to be dissolved without just and legal ground, it might give them pause.

For from the point of view of society there has now come into the body politic a new atom, containing—to carry the simile a step farther—one positive and one negative electron, with the power of reproduction and of energizing or weakening the whole—a new unit of organization which must co-operate with all the rest and be subject to the laws making for national health and progress, including—such as they are!—those governing marriage and divorce.

§ 4

“Whom God hath joined together, let no man put asunder.”

The subsequent facts sometimes seem to belie the inevitability of the priestly injunction, but the answer is simple enough—the church does not regard those to whom it grants marital relief as ever having been joined together by the Almighty. It does not divorce; it declares void.

This is no mere sophistry, either. To accept any sort of ceremony, legal or ecclesiastical, as conclusive upon one's entire future, from which there can be no escape for any cause whatever, would be to return to the Dark Ages. No! Quarrel as we may

about divorce, we must all agree that certain marriages should be prohibited by law and, if entered into, should be declared null and of no effect.

One does not have to be a lawyer to realize that certain marriages cannot be regarded as marriages at all, either in the eyes of the law or of the church. This has to be so. Some people are physically unable to marry, some are mentally incompetent, some are tricked into marriage, and some have marriages thrust upon them. For all such, by every sanction of humanity and public policy, there must be a means of escape, although at the same time and by the same means, other undeserving persons may seek to evade their marital obligations.

Divorce grants relief for reasons arising after marriage, for which, presumably, one or the other of the parties is to blame. Annulments are granted for causes existing before the parties are united, and which vitiate the contract. In this realm, rather than that of divorce, lies the romance, the drama, the humor, and the pathos of the law of marriage.

All of the good, and some of the evils, of these marital laws grew out of the effort of the early church to elevate society by declaring marriage a sacrament and practically indissoluble—for, later on, the church found its control of marriage a valuable political asset which it was loth to relinquish.

Law is composed about equally of common sense and of precedent—that is, what was, or seemed to be, common sense at the time the law grew up, but which has since ceased to be so. It seemed quite

sensible to our forefathers to throw old women into horse-ponds in order to find out whether or not they were witches, by watching to see if they would float; to treat all persons who could read and write as a privileged class on the ground that they were "clerks" or clergy and hence not liable to punishment for their peccadilloes in the ordinary courts. The law of marriage is peculiarly encrusted with legal barnacles.

The only way to answer the conundrum of "When is a marriage not a marriage?" is by saying promptly, if not very intelligibly: "When one of the parties is disqualified or where there is force, or fraud, or mistake, or where they have not conformed to the forms of law." And it should be carefully noted that marriages may be "void" or "voidable"—that is to say, void only after having been so declared by a competent court, a feature of considerable interest, particularly to any children who may have been born during the union in the meantime.

This distinction between "void" and "voidable" marriages grew out of the conflict between church and state and made its first appearance in the time of Henry VIII. A void marriage is an actual legal nullity. It never existed. It can be impeached in any court under any circumstances and whether or not the parties are alive or dead; while, to use a business term, a voidable marriage is "good till cancelled" by a competent tribunal. But when, however, a voidable marriage is thus cancelled it ceases to have been good at any time and, once set

aside, it is treated as void from the beginning, or *ab initio*, as lawyers say. It is also worth noting that unless a suit for annulment is brought to a conclusion during the lifetime of the parties, the proceedings fall and the marriage stands.

A "void" marriage creates an illegal relationship; a "voidable" marriage protects the parties and the children until it is dissolved, when the protection is withdrawn. This is the hardship of the voidable marriage, and it is encouraging to find that modern statutes tend to protect as far as possible persons who act in good faith, even though already married, and provide for the legitimization of the children.

Modern common sense is against the old, harsh doctrine of nullity *ab initio*, and in general the judgment of the court is made prospective and not retroactive, in order that vested rights may not be upset and innocent children suffer for the follies of the parents. Quite properly, however, the law has no consideration for persons who go on living together after they find out their supposed marriage is illegal.

This brings us to the first and most dramatic of the several so-called "disabilities"—a lawful husband or wife still living. The most familiar example of this complicated situation is the celebrated case of the unfortunate Mr. Enoch Arden; and the many statutes which have been passed to relieve others in similar plight are accordingly known as "Enoch Arden Statutes." They exist almost everywhere.

Deserted wives and husbands who remarry without ascertaining whether they have a legal right to

do so, may easily find themselves within the law against bigamy, on the theory that no separation, however lengthy, can dissolve a union so long as both parties are actually living. To-day there are hundreds of statutes passed to protect the children of such marriages entered into in good faith.

The early English statutes relieved from the penalty of bigamy those who remarried after waiting for an absent and uncommunicative spouse for seven years. In New York, the required period of absence is five years; in Ohio, three years; in Massachusetts, seven years; and in several States, where one party marries on a false rumor of the other's death after an absence of two years, the returned absentee may take his choice whether to have his wife restored or his own original marriage dissolved. In all cases where a husband *abandons* his wife and remains away five years, he is presumed dead and a subsequent marriage is as valid as if he were dead.

There is said to be a "special Providence" for idiots, drunken men, and sailors. To a certain degree the law acts in that capacity, for it does not permit the lunatic or the hopelessly intoxicated to marry, and it looks with leniency, as we have seen, upon the marital relationship of the wandering mariner and his more stationary helpmeet.

Of course, the insane cannot marry. If a man is legally incapable of entering into other contracts, he certainly will not be permitted to give away his property or to bind his person for the rest of his life. The law of insanity in marriage is interesting

but difficult of application. Indeed, many persons, including some judges, regard marriage in itself as an indication of mental aberration.

However, the law says both that an insane man may contract a binding marriage during a lucid interval and that the drunkard may marry so long as he was not so drunk but that he knew what he was doing. In the old days this latter excuse did not go, since the common law permitted no one "to stultify himself." Deaf and dumb persons were formerly regarded as idiots and so could not legally marry. They now do so in the sign language.

Race, color, and social rank no longer act as bars to marriage to any extent, although they did in the past. Before the Civil War, slaves could not marry, but acts of Congress have since legitimized any such past relationship. Marriage between negroes and whites is forbidden in many States and so, on the Pacific coast, is marriage between Chinese and whites. The most interesting prohibitions under this head are the old statutes which forbade the intermarriage of Roman Catholics and Protestants in States like Massachusetts and Pennsylvania.

In the practice of my profession I have been constantly struck by the ignorance of clients regarding such an elementary legal proposition as that the law does not permit all persons of the opposite sex to marry.

But besides (1) mental incapacity, (2) disqualification by law based on race, color, and, in some countries, rank and religion, and (3) the impediment of

having another husband or wife still living (the first marriage being still undissolved), there are many other bars to marriage, including (4) physical incapacity, (5) age, (6) consanguinity, or nearness by blood, (7) affinity, or nearness by marriage, (8) the use of force or "duress," physical or mental, (9) fraud and false pretense, (10) mistake and error, (11) failure to observe the requirements of the local laws governing what is necessary to constitute a valid ceremony, (12) failure to secure proper consent of parents where the parties, or one of them, are under age.

In a word, the "once-married-always-married" rule applies only when you are actually married, and, after talking to an expert divorce lawyer, you may be inclined to conclude that most people are not really married at all, but only think they are.

For the benefit of the unhappy reader who up to this moment has regarded his own case as hopeless, let me ask:

Did you, dear sir or madam, marry while you were in a state of temporary insanity? Or during the pre-Volstead days? Or while you were under the influence of some drug administered to alleviate a bodily pain other than of the heart? Did you, perchance, have a forgotten wife or husband lurking somewhere? Were you under the age of consent? Or was your spouse related to you by either blood or marriage—a cousin, perhaps? Or did he or she deceive you with false stories of the purity and innocence of the past?

Or were you, perhaps, knocked down, bound hand and foot, and married in spite of yourself? Or were you hypnotized? (Yes, that cat will sometimes fight!) Or did you make a mistake and think you were marrying John when in fact you were marrying James, or Joan instead of Jane? Or did you forget to publish the banns or get a license or ask the permission of your parents? Then, dear reader, take courage! There is still hope for you! Six months from now, not in wicked Paris or Reno, but in your own good, honest home town, you may have successfully knocked the shackles from your ankles, the gyves from your wrists—and, like a bird freed from the cage, be looking for trouble all over again.

The law governing the so-called “age of consent” is unusual in several particulars. The main feature to be observed is that the marriage law differs from the law of contracts in that a person under twenty-one may still contract a perfectly valid marriage if he or she have reached “the age of consent,” which varies in different countries and in different States. Thus “infancy” is not a ban to marriage as it is to contract. If married below the age of consent, however, either party may disavow the marriage on reaching the required age, but if this does not occur, no new ceremony is necessary to render the marriage legal at common law, and an election to affirm it will be inferred if nothing is said or done about it.

So, if the parties decide to stay married, they are

bound forever—as husband and wife—hard and fast, or at least as nearly so as anybody else is. The age of consent under the English common law was 14 years for boys and 12 for girls, a rule adopted from the Roman law, but in this country the age varies widely for both, as it does in Continental countries. In 1916 the age of consent in Quebec was 14 and 12; in Ontario and Austria 14 and 14; in Kansas and Missouri, 15 and 12; in Brazil and Iowa, 16 and 14; in France, Italy, Belgium, Rumania, and California, 18 and 15; in Holland, Hungary, and most States of the Union, 18 and 16; in Denmark, Norway, and Germany, 21 and 16.

Having thus lightly touched upon the high spots of matrimonial disability, we come to the one which has given more trouble and caused more hullabaloo than all the rest put together. For as a rule people do not rush into polygamy, trigamy, or even bigamy, insane people are pretty carefully looked after, prohibition protects the philanderers from the philter of love, and children incline to obey their parents up to the middle of their teens. But men and women will fall in love with their cousins; and for some reason or other men want to marry their deceased wives' sisters. The reasons are unimportant. Suffice, that they do. And it has also made trouble ever since the eighteenth chapter of Leviticus, where God's disapproval of such irregular intimacies is set forth with all the picturesqueness of the Hebrew scribe.

Now we know without being told that the mar-

riage of close blood relatives is likely to be disastrous from the standpoint of biology and eugenics. But many of us do *not* know that the intermarriage of persons of entirely different blood and connected by marriage only has likewise been forbidden from the earliest times. The reasons are historical, sentimental, legally fictional, and highly problematical. The author of Leviticus said that such marriages are "wickedness" because they are "near of kin" and let it go at that; and the church, building upon this general statement, developed it, largely for the sake of political leverage during the Middle Ages, to an astonishing degree—so astonishing, in fact, that a statute was passed in England in the time of Henry VIII forbidding the annulment of marriages which were more remote than the Levitical decrees.

"Consanguinity" is the word by which blood-relationship is legally described, and on that account all marriages are forbidden in the direct line of either ascent or descent. But the English law went further and put "affinity" on the same footing with "consanguinity" as a bar to marriage.

Archbishop Parker's table of degrees has, since 1563, been the standard adopted in the English ecclesiastical courts. It applies equally to illegitimate as well as legitimate children and to relatives of the half-blood equally with those of the whole, and it provides that a man *may not* marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, father's brother's wife, mother's brother's wife, wife's father's sister,

wife's mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, etc. These general principles are recognized in the United States, although the doctrine of "affinity," which forbids marriage between those connected by marriage, is not applied nearly so stringently.

But why on earth should the law forbid marriage between a man and one of his wife's kindred? Let us see! One reason might be the legal fiction that a man and his wife are one person, which "logically" would make a man the same relation to his wife's sister as to his own—and, of course, a man cannot marry his sister! Another might be the possibility that the sister might conspire with the husband to do away with the wife in order to get her job—if it was open to her by law. Both seem far-fetched. Yet the canonical rule was absolutely clear that wherever relationship to a man himself would be a bar to a marriage with him, relationship to his deceased wife would be the same bar, on the ground of "affinity." To such extreme lengths was the doctrine carried that relationship by adoption or baptism was put on the same basis as that of blood, and prior to the Council of Trent the relationship of godparents to godchildren was a bar to marriage. The affinity idea is nothing new. "Solomon made affinity with Pharaoh, King of Egypt, and took Pharaoh's daughter." (I Kings 3: 1.)

For general purposes, it is enough to say that the law of consanguinity usually prohibits marriages between persons nearer in relationship than first

cousins; and there are some States of the Union that forbid marriages nearer than second cousins.

As to affinity, in some of the United States a man may not marry his father's widow, his wife's daughter, his grandfather's widow, his wife's grandmother, his son's widow, his mother-in-law, his grandson's widow, or his wife's stepdaughter. Why? Answer the question as you will. And it is the law that, in every such case, the prohibition continues *notwithstanding death or divorce!*

On the basis of husband and wife being one, this is of course logical, and if the underlying reason is to discourage wife-poisoning, it is imperative. Whatever we may think about it, no question has aroused more violent discussion than whether a man should be permitted by law to marry his deceased wife's sister. It turned English society topsy-turvy as recently as 1907, before which time such a marriage was made a criminal offense.

From all of which, it may appear that if one has any inclination to stray away from the beaten paths of matrimony, it would be well to consult a lawyer.

The question of what can be done when a bogus nobleman worms his way into the tender affections of one of your female relatives and induces her to run away with him, how far marriages may be legal without a "formal ceremony," what remains of the old "common law" marriage, what sorts of fraud and what kinds of mistake will vitiate a marriage—in fact, the more picturesque side of this engaging subject still remains to be discussed.

§ 5

Query as to the effect of force, fraud, or mistake upon an otherwise valid marriage plunges us into the haunted forest of legal romance, as much frequented by the novelist and playwright as by their often no less imaginative brother-in-law, the divorce lawyer.

In its shadowy depths hide all the schoolroom lovers too young to marry, the multifarious victims of adventurers and "vamps," of marriage-mongers and mock marriages, and the youth blackmailed into marriage or driven to it at the pistol's point; it has received and harbored the eloping couple on their way to Gretna Green pursued by irate fathers, and its lanes have echoed to the clatter of hoofs, the snap of whips, and the crack of the blunderbuss; and from it, at the precise psychological moment, in response to the invitation "if any one has just cause let him now speak or forever hold his peace," has startlingly emerged the pallid ghost of the discarded mistress to lift a forbidding hand.

I have always found this field of the law of intense human interest, both on account of the many curious predicaments into which a misguided or too hasty love frequently precipitates the parties and of the fifty-seven varieties of legal hocus-pocus by which they are got out of some of them. For, be it whispered, although the law is not only not human but is often inhuman, some of the judges who ad-

minister it have hearts and emotions under their bombazine gowns just like other people, so that the law's very inhumanity frequently arouses upon their part a rebellious ingenuity.

Somehow or other the river will find its way to the sea. Is there a judge so "case-hardened" that he will not seek to relieve the pretty innocent who has been snared by the cold-blooded and mercenary licentiate, perhaps already too much married? If so—out with him! What are judges for but to right the law's ineptitudes at the cost of their own salvation? Necessity is the mother of invention—in the law as elsewhere; and the law has shown a creditable ingenuity in separating people who really—as a matter of common sense—ought to be separated.

Indeed, a judge may be saying to one woman: "What! You wish to be divorced because your husband hit you with an axe? What an unheard of suggestion! I will not entertain it!" and the next moment will in effect be saying to another: "What, my dear? You say this miserable rascal, your father's coachman, took you out a-riding and persuaded you to marry him? Outrageous! Of course I shall annul this marriage."

"Hard cases make bad law." Annulment cases are always hard cases, and they have made some very bad law indeed. Had the coachman *forced* the young miss to marry him, we should have had a very different situation. But what is "force"? And what kind of "force" should invalidate a marriage? Here, if anywhere in the realm of the law, the Recording Angel

may regard a judge as excusable for making use of what is euphemistically called "a wide discretion."

Of course the actual use of physical force should and does invalidate any marriage, for there has been a physical constraint of the will of one of the parties. But in the case of very young girls, or even of immature women, it is not hard for an unscrupulous man to exercise an influence, partly physical and partly mental, which is tantamount to force. I never knew personally of a single case of a marriage brought about by physical force; but I have known of dozens of cases where an older man, and sometimes an older woman, practically coerced the will of a younger person into marriage, or what was in effect the same thing.

I have heard of cases where spirit messages have been used to induce the belief that a proposed marriage was viewed with favor in the other world. In most of these there was an actual moral coercion by a stronger will acting upon a weaker one through the means of delusion.

But there is another well-known class of cases where the "force" is often actually physical as well as moral. This is where a lady feeling herself aggrieved causes the arrest of the offending gentleman and compels him to marry her under threat of prosecution. Is that "force"? What does the law say? With its usual acumen, the law replies that "sometimes it is and sometimes it isn't" and that "it all depends"—largely upon what the man has done and how bad an egg he really is. It is "force" if

the arrest was illegal, and it isn't "force" if the arrest was legal, unless there are "malicious circumstances."

Anyhow, be careful how you marry while under arrest, if you wish later to repudiate your rash act on the ground that you were forced into it. The law has a mean way of presuming that where the arrest is for probable cause, the underlying reason for the marriage was not "fear of violence" or "an overcoming of the will," but "an honest repentance for a wrong wilfully done."

Note that a marriage annulled for force or fraud is absolutely void—*ab initio*—and it can be questioned in any court under any circumstances, although the innocent party can always elect to have it stand if he or she so chooses. It should also be remembered that unless the injured party instantly takes legal steps to dissolve the marriage, the law will—if the parties continue to live together—presume that the fraud or force has been "condoned."

Very old men or women are being constantly lured into unseemly marriages with schemers many years younger than themselves. While usually in such affairs there is present an element of fraud, the time and machinery of the courts should not be occupied with conjectural investigations concerning matters peculiarly within the knowledge of the parties themselves. Love may be æsthetically indispensable, but it is not a legal essential, and it cannot be weighed in the scales of justice. If a woman can't tell that a man is lying when he says he

loves her, how can a judge and jury do so afterward?

Love is blind, and courts cannot grant relief for blind credulity, however adroitly made use of. The law cannot be bothered to examine into alleged false pretenses regarding such vague things as "birth," "character," "social position," "wealth," "health," or "temperament." Who knows what they are? This rule however is relaxed where the husband has concealed the fact that he is an ex-convict; or where the wife has an illegitimate child a few months after her marriage. This last situation has many phases and has occasioned much diversity of law.

As to "mistake and error," these, like fraud, must go to essentials. Almost inevitably they are involved with fraud of some kind. It would be difficult to find a case where a mere mistake, by itself, has been held to annul a marriage. At least, that is what Chancellor Kent said, and he ought to have known. By "mistake" is not meant merely erroneous information as to the other party's character, means, position, or even name, but a mistake as to his actual identity or a genuine misunderstanding as to the effect and legal consequences of the ceremony.

Of course a person unintentionally trapped into a marriage ceremony is not bound by it, and a mock marriage is no marriage at all—although either sort becomes valid if the parties choose to act upon it, in which case the party who might have availed of the fraud is "estopped" from doing so.

I once had a case where an elderly lady was tricked into marriage with an ex-convict who falsely represented to her that he was a Bavarian count of distinguished lineage. Unfortunately, she did not act with any great promptitude on the receipt of the information and spent several months in his society while making up her mind what she had better do about it. On the whole I do not believe she had an unpleasant time. I was met upon my application for an annulment with the argument that, as she had gone on living with this crook after knowledge of his true character, she had condoned the fraud, if indeed there had been any such as the law would recognize.

In reply I pointed out that she was of advanced years and in delicate health while the adventurer was a vigorous man of twenty-six, and that he undoubtedly exercised such dominating influence over her mind *even in his absence* as to deprive her of the power of will necessary to condone his fraud. Two judges, at least, thought less than nothing of my highly refined theory, but a tenderer hearted man than they finally granted her a decree. I have never decided for which I had the greater respect.

In that case, as in most, there were elements of fraud, force, and mistake combined, and it would be hard to say which was predominant. We may even suspect—although it is not for us to judge—that neither one, nor all three together, really operated as an inducement to a marriage that otherwise would not have taken place. Probably my client

married for the sake of getting married. But there is likely to be another element in such situations that plays a vital part. The party deceived is usually very young or very old, and, there is almost as much reason for a maximum age beyond which a marriage should not be legal as a minimum age below which it should be void.

The number of elderly men and women, between seventy-five and ninety-eight, who marry persons thirty or more years younger than themselves is remarkable. We all know of such cases. They are usually the result of cupidity, and in the end cause disillusionment, unhappiness, and hardship. Ninety is a dangerous age. Yet, while under the law a girl of seventeen cannot in many States contract a valid marriage, her centurian great-grandfather may do so unhindered by anything but the possible jeers of his relatives. Why not quit marrying at, say, seventy-five, or at least make it legally necessary to secure our children's consent?

In all such cases, where force or fraud is present, the marriage is binding without further ceremony at the election of the injured party. If annulled by the court, it is done on the theory that, owing to the fraud or force, there never was a consent to the marriage; but where no annulment is sought the consent is taken to be complete. The offending party, of course, has no such choice. He is married or not married at the option of his victim.

There is no end to the complications which may result from the failure to conform to legislative

requirements, or from the partial or incomplete solemnization of a marriage. But each case has to stand upon its own bottom, and it is a safe bet that no one can prophesy in advance whether under certain circumstances a supposed marriage is a marriage or not. In the absence of statutes, and according to what may be called "natural" or "public" law, a valid marriage may be contracted simply by mutual consent. This is technically known as "informal celebration." But among all nations, from time immemorial, marriage has always been attended with peculiar forms and ceremonies of a religious character.

However, the English canon law, the Scotch law, the laws of various European continental countries, the laws of some of our own States, and perhaps the English common law, all dispensed with the necessity of ceremonial observance, regarding the institution of such importance to society that it ought to be held valid if good "in the sight of God." This was what was known as a "common law" marriage. It was in truth very common indeed and made no end of trouble. Common people were by no means the only ones who commonly indulged in it, and common law wives were forever turning up after a man died to claim dower and whatever else they could get, so that in 1753 Lord Hardwicke's act provided that no marriages should be valid unless solemnized in due form in a parish church or public chapel with previous publication of banns, except by "special license."

The rigor of this act has been modified in both England and in this country to permit of civil ceremonies before a register or other official. To-day at the option of the parties, they may marry either before a clergyman or with the participation of some civil officer. But that does not settle everything by any means. Questions of great nicety will arise so long as people marry. For example, is an informal marriage, in a State which requires formalities, absolutely null? What is the effect of a partial ceremony? Suppose the clergyman drops dead in the middle of it? Must he have "pronounced" the couple "man and wife" to make them so?

Is a marriage without a religious ceremony valid under the common law of England? Nobody knows. The issue was raised in the House of Lords in 1844 and resulted in a tie vote, and a similar case in our own country (*Jewell vs. Jewell*) came before the United States Supreme Court with a like result. So the conundrum of "When is a marriage not a marriage?" must in each particular case remain unsolved until some learned judge has heard all the facts and then acted as an umpire between his head and his heart. Perhaps in the end, his decision may turn upon whether or not he is married himself!

XI

HAVE YOU A LAWYER?

INTRODUCTORY APOLOGIA

The following eulogy of lawyers may seem to the indiscriminating reader inconsistent with my previous animadversions upon the general character of the profession. It may even lead him to rush off and at once retain an attorney or at least to go so far as to invite one out to lunch, which is the customary way to try to get free legal advice. But in any event I shall lose no sleep over the matter. Lawyers, of course, like plumbers, are necessary evils, and the legal journeyman is usually about as honest and almost as efficient.

At any rate I am glad to include this trifling recommendation out of consideration for those of my erstwhile brothers-in-law—who have not had the good fortune or the courage to get out of it. It is beyond doubt one of the best “ads” ever written in behalf of a profession which pretends that it is unethical to advertise except viva voce—as is evidenced by the fact that it was reprinted (in two colors) by the Lawyers’ League of Pennsylvania and distributed broadcast in that lawyerless land. To reread it after the lapse of a decade almost brings tears to my eyes. Certainly it carries extraordinary conviction. Could I have ever been one of these invaluable counsellors and friends, whom no family should be without? Alas, poor Yorick!

XI

HAVE YOU A LAWYER?

Do you not call ten times as often upon your doctor for assistance and advice as you do upon your lawyer? In fact, would not *twenty* times be more nearly correct?

The average man consults his attorney only when he is actually in trouble, or at some important crisis in his affairs; but he is accustomed to telephone the family physician on comparatively slight provocation, and does not wait until his wife is on her death-bed to invite his actual presence. If his little girl has a sore throat, he is quite ready to ask the doctor if she ought to go to school—and pay him for his advice. In a word, he regards doctors' bills of the minor variety as premiums upon insurance against disease and bad health.

But he does not make use of his family lawyer, if he has one, in the same way. He has a feeling that lawyers invariably make "substantial" charges, and he recalls with anguish the (doubtlessly reasonable) bill rendered to him for the settlement of his father's tangled estate. He has the delusion that if he crosses a legal threshold the adventure will probably cost him fifty dollars. One likely reason for this is because in the United States lawyers do not

require their clients to pay a small consulting charge before leaving the office, as they do in England, and as they do in many doctors' offices here. There is something ominously vague about lawyers' bills. The client is afraid of "getting soaked."

Now the truth is that the citizen gets vastly more for his money by consulting a lawyer regularly in regard to his affairs than if he seeks his help only in time of trouble. For simple advice a lawyer charges no more than a doctor. Indeed, unlike the doctor, he frequently makes no charge at all. Many offices make it a rule to supply gratuitous general advice to clients, and charge only for really important services. At any rate, the man or woman who systematically consults an attorney, instead of avoiding him, saves money in the long run. Every family should have its friendly legal adviser, who knows the vagaries and idiosyncrasies of its various members, just as it has its physician. Whereas the doctor can only try to prevent sickness or to cure it, the lawyer not only prevents pecuniary loss and rescues the client in adversity but also often points out to him how he may profit financially in unexpected ways.

An example of this was the custom among authors in the past of sending manuscripts to publishers and, in the event of acceptance, completing a sale by cashing the check received in payment. They sometimes discovered to their dismay that they had parted with property rights in their manuscripts which they had intended to retain and, in addition,

with rights of which they had never heard at all and did not suspect to exist.

A well-known woman writer who once sold "a best-seller" to a book publisher, also a magazine proprietor, learned too late that, whereas she had divested herself of every interest in it, she could, by sending a properly worded letter with her manuscript, have retained for herself, and afterward sold, the English and Canadian book rights (worth, say, \$2,000), the American and English serial rights (worth \$30,000), the "second" serialization rights (worth \$1,000), and the moving-picture rights (worth, at least, \$25,000). All this she might have ascertained in advance by consulting an attorney, at a cost of from five to ten dollars. This woman has been entirely cured of the idea that she can get along by herself.

Suppose, for example, that you receive a printed document called a "summons," directing you to present yourself in a police court some five miles distant from your home, at a particular hour on a particular day, when your business absolutely requires your presence in some other city. Four men out of five would obey this seemingly unavoidable command, even at considerable cost in time and money, before they would think of inquiring of a lawyer whether they were legally obliged to do so. Do you know? Are you aware whether a subpoena left upon your doorstep or upon your desk carries with it any legal authority? It might easily become a matter of at least more than passing interest.

The most important document that a man is usually called upon to execute during his entire lifetime is his own will. It is generally, however, a transaction which he is perfectly content to let take care of itself, hit or miss—any old way. He supposes that if he writes down “what he wants done with his property,” signs it, and gets somebody to witness it, [his heirs, executors, administrators, and assigns will go blithely on their way, rejoicing forever. It is almost impossible to convince people that there is really any care necessary in drawing a will. Yet, even if a will is properly drawn, there are nine chances out of ten that, unless the attorney watches with eagle eye, it will not be legally signed and witnessed. What usually happens is something like this:

A business man receives his will from his lawyer, reads it over, is satisfied, and sends for a couple of his clerks. They come in, leaving the door of the office open.

“Boys,” remarks the employer, “I want you to witness my signature.”

“Yes, sir,” say they. “Very good, sir.”

He signs the paper and hands the pen to the first, who sits down, subscribes his name, arises, returns the pen, and, with an “Is that all, sir?” goes back to work. The second clerk then signs. The “business man” locks the will up in his strong box, satisfied that all the requirements of the law have been duly fulfilled!

In point of fact the attestation is valueless.

He has not declared the instrument to be his *will*; he has not requested his employees to sign as witnesses to his *will*, and they have neither seen each other sign it nor signed it in each other's presence. For good measure, each has probably been guilty of an offense in not affixing his address as well as his name to the paper.

Assuming, however, that a testament is legally executed and witnessed, the trouble is apt not to end there. Most people are under the impression that if they write a letter and place it with a will they can alter the provisions of the instrument as they see fit. These "letters" and like detached expressions of testamentary desire, made in lieu of legal codicils, are always turning up and causing no end of embarrassment. It is obvious that as the law requires a will to be witnessed in a particular and artificial way a testator cannot arbitrarily avoid those requirements by making a supplementary will, for that is all such a "letter" is in fact. Yet the "letter" delusion will not die.

Why is it that people who know that they can't mix bread, sail a ship, or mend the plumbing think they can draw their own wills? It is hard enough to find even a lawyer sufficiently erudite and careful to whom can safely be entrusted the task of drawing a will disposing of real property.

To a lawyer it seems preposterous that any layman should attempt to draw a will. Yet it is constantly done. Such wills are almost always hopeless. Occasionally, where a man leaves everything

to one person and inquires carefully about the legal requirements of attestation, he may get away with it. But I have never known of a "self-made" will with a trust in it or a devise of realty to be valid, or to operate as intended. Suppose you wished to leave a farm to your cousin John and that, if he should die before you, it should go to his heirs? Suppose, accordingly, that you inserted in your will the plain declaration that you gave your farm to John "to have and to hold to him, *his heirs* and assigns forever?" And suppose John died, and that then you died, would John's heirs get the farm? Or *wouldn't* they get it?

The chief trouble with the lay or "sea" lawyer is that he doesn't look ahead and provide for contingencies. He has no legal imagination.

Does the law allow you to leave all your property away from your wife and children? May you leave it all to charity? Can you tie up property in trust for two years? Can you give property to your wife with instructions to accumulate the income for a definite or indefinite time? Can you leave property to your cousin, if he will agree not to marry? Can you leave a legacy to one of the witnesses to your will? Can you leave real property away from your wife without further provision in her interest? Can you leave your farm to become somebody's property at the end of five years? How many witnesses does the law of your State require? Does a will have to bear a seal?

The same complacent attitude that the average

man adopts toward securing legal assistance in drawing his will he exhibits with regard to almost every thing in which legal aid might easily be obtained or profitably be sought. The nearly criminal nonchalance with which a business man will sign documents is a matter of common knowledge. He almost prefers to sign a paper, no matter what it contains, than have it lying around his desk. He has a well-developed case of the "sign here" habit. The answer of the insurance magnate during a recent investigation is famous:

"Didn't you read over the paper before you signed it?" he was asked.

"No," he replied innocently. "I thought it was *only an affidavit.*"

This kind of thing needs no comment; but the ordinary citizen is much too casual with regard to signing contracts and important business letters. A contract or business letter carelessly signed may cause him hundreds, if not thousands, of dollars of loss, yet he cannot overcome the inertia which prevents his consulting his attorney. He feels that, since he has enough sense to run his business at a profit, he ought to be able to read through a contract and know what it means without having to ask a lawyer. He dislikes to have a comparative stranger know all about his affairs, although he is quite habituated to the doctor having an intimate knowledge of both his wife and family, seeing him and them, so to speak, in their nakedness.

So he will casually examine and sign complicated

papers which have been drawn by legal experts with a view to securing every right and every advantage to his business opponent. This would not be so dangerous if he had made a study of the law governing contracts, but usually he has not, and he may easily discover later on, to his cost, that certain words which he has heard, more or less, all his life, have, in law, an entirely unexpected significance.

For example, a business friend may make a partnership proposition to you, which you accept, and thereafter you lease a store together and hang out your sign. Do you know whether you violate the law by the mere act of so doing without complying with other statutory requirements? Have you any real idea of your liabilities as a partner? Do you know whether you can go into partnership with your wife? Can one partner steal from another, in the eyes of the law? Can you bind the other by fraudulently and without his authority endorsing the firm name to checks or promissory notes? Do you know what your personal liability is in the event that your partner turns out to be a rascal and swindles your local bank by securing advances from it on the strength of false pretenses as to your assets?

This matter of unsuspected liability is important. Suppose in a burst of altruism, you agree to become a member of a committee to assist in some sort of commendable relief work. You have a meeting or two and decide to hold some sort of an entertainment, authorizing your chairman or president to

make arrangements. He or she promptly engages the local opera house, an orchestra, and performers. The show falls through. Are you liable for the rent of the opera house, either all or part? Can the juggler sue you for breach of contract? If the treasurer of your committee absconds with the gate receipts, will you have to go down into your own pocket to make good?

You may, perhaps, have other unpleasant surprises. Do not assume that because you have never been assessed as a stockholder in a corporation in which you have invested money that you never *will* be. Do you know whether you will have to pay damages to your cook if she slips on a piece of frayed oilcloth on the back stairs or on a banana peel in the area? Or whether you can be sued by the postman if he falls on your ice-covered front steps? These things occasionally happen.

The most frequent and likely controversies in which the citizen of either sex is likely to become involved are with domestic servants and business employees. Suppose you become dissatisfied with a workman whom you have engaged at a monthly salary. If he gives you adequate reason for discharging him, how much notice, if any, does the law require?

Suppose you have discharged a domestic servant for good cause in the middle of the month. Must you pay her or him up to the day of his or her discharge? Assuming that you must do so, are you aware whether you comply with the law by offering your

départing domestic a certified check? It is worth having at least a chat with the family lawyer on these subjects. It may perhaps save you money.

The number of people who never heard of the "Statute of Frauds" is astonishing. This statute, in some form or other, exists in every State of the Union. Roughly, it is to the general effect that neither a contract to sell nor a sale of goods shall be enforceable at law, if the value of the goods is more than a specified sum (usually fifty dollars), unless the buyer shall accept and actually receive a part of the goods, make a deposit on account, or sign some note or memorandum of the contract or sale. It is one of that general class of statutes designed to protect people from false claims to the effect that they have bought or sold goods or land, or have agreed to pay sums of money for services or otherwise.

Obviously, anybody who ever buys or sells anything worth more than fifty dollars should be at least on speaking terms with this statute and its local interpretation. Yet, if for some wholly honorable reason he wishes to take advantage of his knowledge of it, he may find to his chagrin that he cannot do so, for the reason that he has thoughtlessly either written or *perhaps merely answered* a letter referring to the matter, which the courts will hold to be "a memorandum." Correspondence, where a dispute has arisen, should be scrutinized by a lawyer, even if the letter be the mere acknowledgment of the receipt of another.

Most of us are apt to assume that the law must be thus and so, either because we think it ought to be or because we have heard that it is. A common instance of this is the belief that a man can escape liability for his wife's debts, incurred for necessities, by publishing a notice in the paper to the effect that he will no longer be responsible for them. Another is that your neighbor has no right to violate your privacy by cutting a window in his wall overlooking your land, backyard or area. There are countless others. Many well-intentioned folk assume that because they are doing something with a charitable motive they can violate every law of the land. For example, lotteries, raffles, and all sorts of gambling devices are common at charity bazaars, and all the good ladies who are responsible for them—if not actually in danger of two years in State's prison—may nevertheless be guilty of crime.

But the most dangerous practice in ordinary business, or even in ordinary domestic life, is the employment of an agent or servant without first ascertaining how far you can be made liable for contracts or purchases which he may make. Suppose that you have allowed your hired man to buy a lawn mower and grass seed at the corner store, that the storekeeper has called you up on the telephone, and that you have told him that the order was all right. At the end of the month you may perhaps receive a bill for all sorts of implements and supplies which you have never received. Are you liable? Many things which you absolutely forbid your agent

to do may yet be within what the law calls the "apparent scope of his authority."

In plain language this simply means that, when you employ another to act for you, you are bound by his acts and agreements so long as they are such as a reasonable man would assume from all the circumstances to be authorized. Obviously, if the shoe is on the other foot, and you have yourself delivered goods to somebody else's foreman, in accordance with regular custom, it would be unfair for the employer to refuse to pay you for the goods on the ground that he has instructed the foreman to make no more purchases, when he has given you no notice to that effect.

The layman should be particularly careful about receiving a less amount of money from a debtor than is due, where a claim is unliquidated or in dispute, since in such cases the receipt of the money may operate as, what the law calls, an "accord and satisfaction." This is not so in every instance, but the rule is well established that where a debtor offers you money conditional upon its being accepted in full settlement, your acceptance of it wipes out the debt—although you protest at the time that the amount received is not all that is due you, and that you are unwilling to accept it in full satisfaction of your claim.

For example, the mere fact that a man owes you one hundred dollars is not enough to warrant your taking fifty dollars, if he offers it to you in full settlement, and then suing him for the balance. You

have no alternative in law but to refuse the money, or to accept it upon the condition which he attaches to it, namely, that it shall constitute payment in full.

Money tendered subject to a condition expressed, either orally or in writing, can be received only subject to such condition, and the fact that the person receiving the money fails through intention or carelessness to hear the statement of the debtor that the payment is to be regarded as in full settlement of the claim does not change the situation, provided the words are so spoken that with ordinary care they might have been heard.

In the same way, where a debtor offers his creditor a check and notes in satisfaction of a disputed claim, acceptance by the creditor of the check carries with it his acceptance of the notes. The creditor cannot retain the check, return the notes, and sue for the balance.

It is frequently assumed that if a debtor sends you his check for a less amount than you claim, and writes upon the check that it is in full settlement thereof, you are free to draw your pen through the distasteful words and cash the check without in any way affecting your right to sue upon the balance which you claim is due you. This is entirely erroneous.

Also after a dispute between two parties, it often happens that one of them sends the other his check, accompanied by a letter to the effect that it is "in full settlement of account to date," and that the

other cashes the check, but in his letter of acknowledgment states that the check has been placed to the debtor's "credit on account," and that he "must decline to accept the payment as final." Unfortunately for him, under these circumstances his failure to consult a lawyer will cost him dear.

The foregoing are but haphazard illustrations of the many instances where the layman can easily be mistaken in regard to the law.

I have sought to point out how the family lawyer is of value, daily, in small things, and how, as a rule, his practical assistance is neglected. Don't wait until trouble comes and then send out a hurry call for the first man with a green bag that you can find. Select a substantial common-sense chap, with a sense of humor if possible, who does not affect too great learning, and make a friend of him. Then he will be on call when you need his help.

XII

IS IT A CRIME TO BE RICH?

INTRODUCTORY

This question is not merely rhetorical. It is distinctly practical. What difference does it make whether or not Congress defines the possession of wealth as a crime so long as it penalizes the possessors, by fining them from ten to forty per cent of their income?

The answer to our question "Is it a crime to be rich?" is therefore in the affirmative. It is. "Let not the rich man glory in his riches!"

But in their righteous indignation our millionaires should not forget that it is, likewise, a crime to be poor. Paupers have always been treated and classed as criminals. To be "without visible means of support" is enough in most places to land a man in the calaboose or on the poor farm, which more often than not is a reformatory as well. The favorite sport in many rural districts is "Pauper, pauper, who's got the pauper?" It is played by a team of "selectmen" taking a tramp, beggar or bankrupt to the town line and pushing him gently over into the next township, in the hope that it will thus become legally liable for his support. Then another team of "selectmen" from the second township tries to shove him back again. Forward passes and drop kicks are allowed. "And he that hath not, from him shall be taken even that which he hath."

XII

IS IT A CRIME TO BE RICH?

THE rise of the multi-millionaire in the United States has occurred within seventy years—the span of but one man's life. During that comparatively brief period the attitude of the public toward great wealth, originally one of respect and admiration, changed to suspicion, antagonism, and hatred, which, culminating during the "Roosevelt Era," has gradually subsided to one of indifference.

Originally we had no rich men in America. Vast personal wealth was foreign to the conception of American colonial life, and even in the earlier years of the Confederate States. So far as I am aware, there was no outcry of "Bolshevik" or its contemporary equivalent when, in 1792, James Madison, in *The National Gazette*, in setting forth his ideas of preserving the political health of society, declared that it could best be done "by withholding unnecessary opportunities from a few to increase the inequality of property by an immoderate and especially unmerited accumulation of riches," and "by the silent operation of laws which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort." This, to be sure, may have been merely political window-

dressings. But honesty, frugality, and simplicity were to the founders of the Republic the equivalent of what "liberty, equality, and fraternity" mean to the democracy of France—and they still are, at least theoretically, the basic American virtues.

From the seed of economic opportunity and equality sprouted the first modest American fortunes. Founded chiefly on trade, they injured nobody—not even the possessors—and excited pride rather than envy. A million dollars a century ago meant something to its owner in social position, in comfort, in manner of life, in what he ate and wore, and how he got about. To-day the man with a billion is no better off than his secretary, who wears substantially the same clothes, eats the same food, and goes to the same hotel. You cannot improve upon the luxury of the modern hostelry; you can only improve the character of those who occupy the rooms.

It would be interesting to know who was the first American millionaire. He probably came from Salem and made his money in the China trade before the era of embargoes, for, like the ships of Tarshish, those of the old Bay State sailed each year to Hong Kong, Java, and Madagascar, bringing home fragrant cargoes of silks, lacquer, spices, and sandal wood, "gold and silver, ivory and apes and peacocks." The word "millionaire" in those days conjured up visions of the jewels of Ind—of "begums" riding in golden houdahs upon the backs of stately elephants.

It is significant that our New England forefathers owed their prosperity directly to their religion. Believing themselves at the instant of delivery from their mothers' wombs, and perhaps before, ordained either on the one hand to eternal rapture, or upon the other to the scorching of hell fire and the gnawing of the worm, it only remained for these God-fearing—or, rather, God-terrorized—men to demonstrate that they were of the elect by their works. The Puritan, and his descendants, for a hundred years and more, led a life of sobriety, frugality, and hard labor, that he might "give out of his abundance" to others and "lay up treasure in heaven." The house in which he lived was small; he dressed his wife and children plainly; he ate little and chiefly of dried cod; and he gave much to disseminate the gospel. To give became, as it still is in certain places, the index of social position; for in an epoch where blasphemy was punished with death, one's standing in the community depended entirely upon one's financial rating with the recording angel.

But working and saving could not but lead to material prosperity. Gradually the ferocity of the religious passion waned, leaving ingrained the habits of thrift and industry. By 1732 Benjamin Franklin was teaching precisely the same practices in his *Poor Richard's Almanac* as the bases of worldly success. Early to bed and to rise made a man wealthy, just as it made him physically fit to worship God in his daily life; a penny saved was as good as one earned for any purpose and more easily got; hon-

esty was the best policy, in the eyes of both God and man, in defiance of which you would neither win heaven nor make money. Eventually, indeed, the New Englander looked more to Poor Richard than to Calvin. Thus grew up those qualities which we are accustomed to associate with the New England character, and which are evidenced to-day in the older Bostonians' distaste for personal ostentation. Even where the Ten Commandments did not entirely give place to Doctor Franklin's philosophy, the prosperity engendered by habits of economy and sober living was regarded as directly due to the personal interest and co-operation of Providence.

It was only natural that a Puritan community, which adopted bodily the Mosaic law as its civil and criminal code, forbade the keeping of Christmas and feast days, and visualized God as an avenging Jehovah rather than the Heaven Father of the Gospels, should have accepted the Old Testament attitude toward wealth as being a mark of the divine favor:

"And it shall come to pass, if thou shalt harken diligently unto the voice of the Lord thy God. . . . The Lord shall command the blessing upon thee in thy storehouses and in all that thou settest thy hand unto . . . and the Lord shall make thee plentiful in goods, in the fruit of thy body, and in the fruit of thy cattle, and in the fruit of thy ground, in the land which the Lord sware unto thy fathers to give thee." (Deut. 28 : 1-11.)

But, of course, in every age mankind has always viewed with respect those whose hardihood, brains,

or skill have resulted in the accumulation of capital, and hence of power and authority. Frequently this respect has given the possessor high place in the social or political order. Sometimes these qualities have simultaneously inspired affection as well. At others, particularly if coupled with condescension or arrogance, they have aroused envy. We respect wealth until wealth is made an instrument of abuse or injustice. Then jealousy augments our righteous indignation, and we turn upon the plutocrat and treat him impolitely.

Public sentiment is a highly volatile affair. It is impossible to say just why some multi-millionaires have been popular and others not. The epoch in which they lived, the kind of business they were in, the methods they employed to amass their fortunes, their manners, and their morals, all doubtless had something to do with it; but probably the greatest factor, if the truth were known, has always been the personalities of the men themselves.

The four milestones among what might be called the "millionaires of yesterday"—each of a distinct type and each occupying his own special and peculiar place in public esteem—were the first Cornelius Vanderbilt, his son William H. Vanderbilt, Andrew Carnegie, and John D. Rockefeller, the elder, representing progressively an accumulation of \$100,000,000, \$250,000,000, \$500,000,000, and \$1,000,000,000.

There were few great fortunes before the Civil War. John Jacob Astor, originally a trader in skins

and brother of a prosperous and popular butcher, died in 1848 at the age of eighty-five, leaving an estate estimated at \$20,000,000. There was nothing romantic about the skin and fur business, nor about the subsequent growth of the Astor fortune to colossal proportions due merely to increased values in real estate.

But the drama of Vanderbilt, the Staten Island ferry-man, who stepped from a rowboat into a fleet of mercantile argosies, at one time numbering sixty-six vessels propelled by steam, captured the public imagination. And when in 1854 he built his own ocean-going steamer of 2,500 tons, and took his wife and his sons and daughters, together with their respective wives and husbands, around the world, the English press received him on his arrival in Southampton with enthusiasm, comparing the limited opportunities for individual achievement in England with those offered by democratic America, as personified in the person of the genial Commodore.

America has always been the "land of opportunity." Our children have been, and for that matter still are, furnished with a literary pabulum of poor boys who achieved fame and fortune, or who rose from canal boats or log cabins to the White House. Oliver Optic and Horatio Alger are responsible for a great many wasted lives.

The founder of the Vanderbilt fortune injured nobody with his steamboats, and even when he went into Wall Street and showed that he was as good a man on land as on water, by gaining control in the

early 60's first of the Harlem, then of the Hudson River, and finally, in 1867, of the New York Central Railroad, nobody thought the less of him. He was in the general opinion a grand old man, and he certainly was one of the handsomest that ever lived. And from nothing, except a pair of oars and a skiff which he rowed himself from Staten Island to the Battery, he amassed a fortune which, when he died in 1877, amounted to nearly a hundred million dollars!

The Vanderbilt story is the best illustration of the possibility afforded by a new country of amassing riches in a comparatively few years by shrewd and assiduous business enterprise. While the success of the first Cornelius was astounding, that of his son William was even more so. Inheriting the bulk of his father's fortune—\$75,000,000—he increased it to over \$200,000,000 before he died in 1885. The public had revered the Commodore in his earlier days and continued to respect him until his death; and on the whole it took pride in William as a sturdy specimen of American business man, although it never gave him entire credit for the truly unusual ability that was his. The Commodore and his son, in a little more than half a century, accumulated the largest private fortune in the world excepting only the combined wealth of the Rothschilds, which had been the result of the most expert financiering in all the capitals of Europe through several generations, with the resources of the greatest monarchs on earth to back their enterprises.

This was the era when the American eagle was screaming loudest, and we hailed these new millionaires as proof positive of the success of our institutions. We took pride in our Vanderbilts, Astors, and the rest, for they showed what we Yankees could do.

The first marked change in the public attitude toward the amassers of great wealth came during the period of expansion after the Civil War, with the appearance in Wall Street of the pirates who juggled Erie and other stocks—Jay Gould, Jim Fisk, and “Uncle Daniel” Drew—followed by the Maritime Bank failure and the exposure of Ferdinand Ward.

It is worth bearing in mind that it was not originally considered respectable to make money by trafficking in bonds and stocks. Gentlemen did not “go into Wall Street.” “I recollect the time,” writes Henry Clews in that most naïve of autobiographies, “Twenty-eight Years in Wall Street” (1888), “that men in the higher walks of life, and among the higher classes (if I may use the expression in opposition to the opinion of the *New York Sun*, whose editor maintains that we have no classes in this country), would have been ashamed to be seen in Wall Street. Now men in the same sphere are proud of the distinction, both socially and financially.” But, by the middle of the century, making money through speculation in corporate securities had lost any stigma from which it may have originally suffered as reaping where one had not sown, and success there became as good an evidence of the favor

of Providence as any other fruits of His blessing—such as abundant crops, a large turnover in dry-goods, real estate speculation, or highly profitable ventures in the export or import trade.

Generally speaking, prior to the "Chapter in Erie" it was generally felt that material prosperity indicated the presence in the near family neighborhood, if not of Providence himself, at least of one or more of the more rugged virtues. After the gold panic of '73 and the exposures of stock market rigging no such fanciful idea longer obtained, and it was perceived that a man might accumulate \$10,000,000 or \$20,000,000 and be nothing but the cheapest sort of common crook. Yet the hostility to millionaires was of gradual growth, merging by degrees into an animosity toward mere wealth itself, until the World War destroyed all social and economic continuity.

The "Chapter in Erie" had occurred in 1866, and for the next fifteen years the "Jolly Roger" could be seen flying everywhere on Wall Street, and railroad-wrecking, stock-jobbing, and "corners" were matters exciting no particular attention.

But there were genuine evils in the actual financing of the railroads themselves, which, when realized, created a grave distrust in the public mind toward corporate enterprise in general—from which it has suffered, in many cases unjustly, ever since. The root of the trouble lay in the fact that a corporation was not a human being. In earlier eras it really was heartless and conscienceless, and, being

merely a machine for making money, was without pride, shame, or sense of decency. Nobody in particular was responsible for its actions, for the responsibility was distributed over a score of officers and directors and easily evaded. Lawyers habitually advised corporations to take chances on doing things which they would not suggest to private clients. There was no ethical restraint, and not much legal restraint either. The old employer had the welfare of his employees at heart; the old corporation had not. In a word, "corporate abuse" was no fiction. It still exists. But the evils to which public attention was at first directed were external rather than internal. The "public" was being injured; the condition of the employee was overlooked or regarded as of comparatively little consequence.

One by one the railroads got into difficulties, and after the panic of 1893 most of them had to be reorganized—a majority by J. P. Morgan. The Interstate Commerce Act of 1887 was followed in 1890 by the Sherman Anti-Trust Law, but neither at the time made serious trouble for big business. Nevertheless it was coming. The handwriting was on the wall.

Meanwhile the national complexion had somewhat changed color owing to the deluge of immigration, made desirable by railroad and construction work generally. These immigrants in many instances brought socialistic doctrines along with them; at any rate, they had no inherited regard for wealth or reverence for its owners, or, if they had had any

originally, the first thing they learned on their arrival at Ellis Island was that they were being oppressed and robbed in a land which they had supposed to be one of opportunity, justice, and freedom.

Municipal politics had always been the most corrupt phase of American life, and the alleged relationship of that corruption to corporate privilege began to be a favorite subject of periodical literature. During the years 1905-6-7 the magazines were filled with muckraking articles.

A lot of it was true, a lot of it pure "bunk." Inefficiency often resembles corruption at first glance. But it was a period of ostentatious extravagance, gorgeous fancy dress balls, licentious and reckless rich men; "night life" began to be popular, and the uncurtained windows of Sherry's and Delmonico's were a continuing instigation to socialism. It was a bad moment for millionaires. The reformers were in the saddle, the highways full of embryonic Jeremiahs. And there were others—not Jeremiahs—who sought for their own purposes to spread the belief among the working men that "these riches came from your wages." All public office-holders were under a cloud of suspicion, and membership in the United States Senate was barely reputable.

In 1901, in the midst of all this excitement about money, J. P. Morgan & Co. conceived and gave birth to the Steel Trust, for the successful delivery of which the attendant physician and his associates received a fee of \$78,000,000, and Mr. Andrew Carnegie was

observed hurrying from the bedside with a bag containing a quarter of a billion, which he had received as his share of the payment made for the Carnegie Iron Works, the largest amount of money up to that moment ever held in the hands of any single individual.

This was the final phase of the antagonism to great wealth, which crystallized during the Roosevelt administration (1901-8), when the huge profit cleared by Carnegie and the Morgan syndicate became generally known. The stock market boom of 1901, temporarily halted by the quarrel between Harriman on the one hand and Morgan and Hill upon the other, which resulted in the Northern Pacific panic and the two hours' insolvency of Wall Street on May 9, 1901, was followed by the Northern Securities suit in 1902, and the decision of the court in 1903 declaring that the combination was in violation of the Anti-Trust Act of 1890. Roosevelt went after the "wicked trusts" with a big stick, and pilloried all "malefactors of great wealth"; and Charles Evans Hughes first appeared in the limelight as counsel for the Armstrong Insurance Committee of Investigation in 1905-6, disclosing just enough of the iniquities of the life insurance companies to shake the nation-wide popularity of District Attorney William Travers Jerome of New York County, because he could not find any punishments to fit their crimes.

Roosevelt, recognizing an honest chance to throw his hat into the ring, did so as usual; and however

softly he might speak, the expression of his face left no doubt in the minds of the sons of toil that the "vested interests" were their enemies. It was quite true that some sort of transitional adjustment from an archaic economic and social condition to modern requirements was indispensable if not inevitable. There were serious labor troubles—a "general unrest among the masses of the people." It was not unlikely that Roosevelt's attacks on the judiciary and his impatience with the restraints of the Constitution did not lessen this—which was in effect an attitude of hostility and suspicion, no less toward those in governmental authority than toward those in financial power.

Yet Roosevelt undoubtedly believed that he was pursuing a middle course between the reactionaries and those who looked with favor on socialism; and, whether he wanted to or not, he could not have reined in the galloping steeds of public prejudice.

The magazines still teemed after ten years with shameful stories of rich men whose lives were dedicated to lust and liquor. All corporations belonged to the "plunderbund." Millionaires—to say nothing of multi-millionaires—were no longer "generously good," but highwaymen and crooks. It is probable that *McClure's Magazine*, one of the best ever published from every point of view, had more to do with changing the character of legislation affecting corporations than any other single influence. The most conspicuous private individuals in the campaign of disclosure were Thomas W. Lawson, with

his "Frenzied Finance," and Ida M. Tarbell, with her famous history of the Standard Oil Company.

In 1907 occurred one of the worst panics in financial history. It was at its worst in October and November of that year. The Knickerbocker Trust Company failed on October 22d, and George Westinghouse's Electric and Manufacturing Company applied for receivers. Currency was quoted at a premium of $4\frac{1}{2}$ per cent, and money on call, when obtainable, rose to 125 per cent. The nightly meetings in Mr. Morgan's library became the centre of interest and of hope. Under his calming influence the situation gradually readjusted itself, and by February, 1908, the panic was over.

In his special message to Congress on January 31, 1908, Roosevelt said: "Every one must feel the keenest sympathy for the large body of honest business men, of honest investors, of honest wage-earners, who suffer because involved in a crash for which they are in no way responsible. At such a time there is a natural tendency on the part of many men to feel gloomy and frightened at the outlook. . . . Our main quarrel is not with the representatives of the interests. They derive their chief power from the *great sinister offenders* who stand behind them. They are but puppets who move as the strings are pulled. It is not the puppets, but the strong cunning men and the mighty forces working for evil behind and through the puppets, with whom we have to deal. *We seek to control law-defying wealth.*"

On that day public hostility to capital and to the

possessors of great fortunes reached its apex. The attitude of the American people as a whole had changed in less than a lifetime from reverence toward wealth to distrust and hatred.

At about this time it first became known that the head of the Standard Oil Company had accumulated a fortune of a *billion* dollars.

II

JOHN D. ROCKEFELLER, SENIOR, was born in Richford, New York, in 1839; he moved to Cleveland in 1853, and at nineteen had become partner in a small commission house.

The discovery of petroleum in western Pennsylvania aroused almost as much excitement as the discovery of gold in California. Aided by the discovery of one of his partners, who had invented a cheap process of cleaning the crude oil with sulphuric acid, Rockefeller went into the oil business, consolidated various refineries, and soon after—in 1870—organized the Standard Oil Company. The next forty years of his life have been described as “the greatest epic in the history of big business.” The historian, James Ford Rhodes, in a careful estimate of Mr. Rockefeller’s character and services in developing a great and vital natural resource, says that he “was to business what Napoleon was to war and society.” That he was a genius, probably the greatest genius in business history, is unquestionable.

Of Rockefeller and his associates, William H. Vanderbilt, who then was possessed of the largest income in the world, said in 1879: "These men are smarter than I am a great deal. They are very enterprising and smart men. I never came in contact with any class of men so smart and able as they are in business."

The senior Rockefeller played the business game in accordance with the rules of the time prevailing in the industrial and railroad world, taking advantage of his ability to distribute freight to compel rebates from competing lines. But up to the time of its suppression by the Interstate Commerce Law of 1887, rebating, like bootlegging to-day, while universally deprecated on principle, was universally indulged in. His business code was the one generally in vogue. His suppression of the middleman naturally made for him an army of enemies. So did his great and increasing wealth. But his original unpopularity as a millionaire was due almost as much to the machine-like quality of his mind, to his reticence, and to the fact that he never let the public know of his benevolences, as to his alleged business methods.

Andrew Carnegie, on the other hand, also a natural-born philanthropist, had begun his well-advertised giving long before he sold out to the Steel Trust. His benefactions were widely known. Moreover, he was the first of the latter-day multi-millionaires to appear upon the scene. Carnegie was a novelty while much of the old respect for wealth still obtained; and he had all the outward trappings of

a Scotch Presbyterian—even if he wasn't one, but only a benevolent agnostic.

But why was it that, after business careers not widely dissimilar, Andrew Carnegie did not suffer from the public hostility that was meted out to John D. Rockefeller? Of course, Andrew had only five hundred millions, whereas Rockefeller had a billion; but that was not the real reason. Neither was it merely because the public was used to the little Scotchman. The difference lay in the personality of the two men. Carnegie was emotional, imaginative, egotistical, vain, and at times ridiculous. He trumpeted his charities and benevolences and lost no chance to get his name on the billboards of philanthropy. He was amiable, loved adulation and the friendship of the great. Since the public laughed at him, it could not hate him.

Broadly speaking, Carnegie cashed in a hundred per cent on every dollar he gave away. If he could have had his own physiognomy struck on the dollar in place of that of Liberty he would have done so eagerly. The public understood his faults, took him at a good deal less than his face value, and had an amiable toleration for the Laird of Skibo. It felt that "Andy" was "all right," although a lot of his libraries turned out to be white elephants. He was always talking, constantly expressing his opinions on matters he knew nothing about, and was readily and gladly accessible. He liked to give his money away himself and to have his finger in every philanthropic pie. He put his relatives and cronies on his

boards and then tried to run them and the boards too. He had a grand time, and everybody enjoyed seeing the fun he got out of it. In a word, he was human—very. Even his agnosticism was an asset. It relieved him nicely of the possible aspersion of hypocrisy.

On the other hand, Mr. Rockefeller was religious, gave largely to foreign missions, attended church regularly, and said grace before meals. Throughout most of the period of Mr. Rockefeller's colossal giving, the public which was benefiting by it heard little of the donor and continued to regard him as the ogre of Miss Tarbell's grim tale. He shunned every sort of publicity. He never gave out interviews or expressed any opinions on matters of public or other interest. Nobody knew what he thought and very little about what he did or how he lived. Extraordinary tales of his parsimony were widely circulated by the press. The old gentleman must have had many a chuckle over all this rumpus, probably feeling that if he donated fifty millions to Chicago University he might be permitted to give a nickel to whom he chose without harsh criticism. In spite of possessing the largest fortune in the history of the world he remained a man of the simplest, —almost ascetic—habits; frugal, methodical, conscientious, with a horror of any form of waste; the most devoted of husbands, the most affectionate of fathers—near to saintliness in his private life. He did not regard the money he had as his. He felt that he had been charged with a duty in amassing it and that

he was now charged with the duty of disbursing it; and he proceeded to do the one just as efficiently as he had done the other. Just as no one has ever lived who could challenge his supremacy as an organizer and administrator of business, so no one in the world's history has given so wisely and productively as John D. Rockefeller, Senior.

Yet, curiously enough, we don't like our millionaires to be too good; and, if they seem to be so, we are inclined to look for the weak spots in the armor of their righteousness. At bottom, I suppose, is the instinctive feeling that since to err is human, perfect rectitude has something slightly inhuman about it and savors a little of business. We like to think that our rich men are kindly, approachable fellows, whose hearts are as big as their consciences, if not bigger. If cleanliness be next to godliness, austerity is handmaid to severity. The higher you climb the mountain of perfect conduct the purer the air and the colder the temperature. We distrust the man who has his emotions under perfect control for the simple reason that we suspect he hasn't any.

This was true of the attitude originally taken by the public toward the elder Rockefeller. But gradually public opinion began to modify. It had originally been hostile and eager to fasten on picayune personal peculiarities as evidences of underlying malevolence. Ten years later the sneer had a chuckle in it. Wise old boy, "John D."! The "John D." did the trick. The abstract idea of a supernatural "robot," a human machine, gave place to that of a

simple-minded old gentleman of democratic habits, amiably addicted to golf and brand new nickels, who, while a Baptist, bore a striking resemblance to Pius the Ninth. "John D." became a person no longer disliked and hardly even feared, although still furtively regarded as capable of getting away with almost anything in a business deal. The personal broadmindedness exhibited in the selection of his aides increased public respect. In philanthropy at least he had demonstrated himself as one hundred per cent efficient and one hundred per cent pure.

The same economy was employed in the giving as in the amassing. Not a dollar but represented a hundred cents. There was and is no "water" in this aggregation of monster benevolences. It is the perfection of scientific giving. Disease is eliminated at its source by a mass attack. "We try to bunch our hits," as the younger John expresses it. Enterprises for the elevation and benefiting of mankind, too vast in their nature for popular subscription, too broadly international in their scope for any single government are undertaken and accomplished. The Rockefeller Foundation took over the entire Belgian relief. It endowed the University of Chicago. It contributed fifty millions toward the increase of teachers' salaries throughout the country. It has built one of the finest medical colleges in the world in the City of Pekin.

All this time, however, the Rockefeller fortune was continuing to grow to the tune of about a hundred dollars per minute. The more money old John gave away, the more kept coming in. He could not

keep up with it. It became a tremendous burden. Hence his organization of the machinery for its distribution by experts.

But these expert philanthropists to whom he delegated the work of the Foundations, the General Education Board, the Rockefeller Institute, and the like, could only disburse and direct the expenditure of the moneys given to those corporations. How much he gave them depended on how well they showed they could do the work. He still retained immense sums in his personal control. That is where young John came in.

John D. Rockefeller, Junior, the most liberal-minded of all the greater multi-millionaires, was born in Cleveland, January 29, 1874, and graduated from Brown University in 1897, at twenty-three years of age, when his father was but fifty-eight. Thus he became associated with his father in business several years before the first benevolent corporation was chartered, and has seen and participated in the development of all of them. He is to-day the chairman of the Board of Trustees of the Rockefeller Foundation. He has been instrumental in distributing for philanthropic purposes more money than any individual in the world's history.

Yet—and this is worth noting!—his real significance lies in an entirely different direction—in the advanced ideas regarding the management of business and the relations of capital and labor which he has actually put into practice in various enterprises in which he has an interest and the adoption of

which by his associates he is seeking to secure in big industry throughout the country. He is one of the two striking figures in the Billionaire Era. Henry Ford is, of course, the other. Rockefeller stands for the distribution of wealth, just as his father stood for its accumulation. Ford does not have any financial significance. He is not interested in money; he distrusts and dislikes it. I don't think he really knows much about it. He takes no stock in "economic law," hates "Wall Street," and regards bankers as crooks. Wealth to him is "goods," "machines"—not dollars.

Rockefeller and Ford are both revolutionary men. Each stands for an entirely new idea.

Let us take young John first. Where did he get the liberal kink that makes his name anathema to most of the old-timers in big industry and that leads him to issue such a challenge to capital as that contained in his Atlantic City speech in 1919, in which he told the members of the National Chamber of Commerce that the *primary charge* on industry should be the welfare of the worker, to which profits should be subordinated if not, when necessary, entirely abandoned?

It has grown entirely out of his conscientious attempt to discharge the trust which he regards as having been placed upon him through the possession of this great fortune. No one else probably has ever inherited such a momentous obligation.

In his novel called "Majesty," Couperus, the Dutch author, has vividly portrayed the crushing sense of

responsibility, the overwhelming anxieties, and the self-distrust of a conscientious young man about to ascend one of the thrones of Central Europe. That the book should have been written in 1905 is extraordinary, although that it should not have stayed the downfall of kings is not surprising.

The book, however, has permanent value in that it will assist future generations in their difficult attempt to visualize a defunct genus. For most of us a king will always be a fierce, helmeted warrior with rattling sabre rather than the elderly gentleman in a gray top hat with field glasses, smoking a cigar, that he frequently was. In any event it is unlikely that the smoke of the cigar will ever effectually obscure the flash of the sword so far as kings are concerned. Mark Hanna will go down to history as a corpulent, corporate monster, tattooed with dollar marks, rather than the simple, loyal, and lovable man depicted by Herbert Croly.

There is a somewhat similar misapprehension in regard to the present protagonist of the Rockefellers. It is worth while to get him right. The popular idea of a billionaire is a luxury-loving plutocrat, not of a hard-working student of industrial relations who stands emphatically for the proposition that wrongs done in the name of making money cannot be righted by giving it away afterward, that the injustice suffered by a lumberjack cannot be balanced against the education of a Chinaman, that oppression in Somerset County, Pennsylvania, cannot be offset by missionary zeal on India's coral strand.

Young John is devoutly religious, but, contrary to what might be expected, his views are of the most liberal sort. As he puts it, "My idea of religion consists in love for one's fellow-men as exemplified in the life of Christ on earth. Nothing else is of vital importance." In addition to his natural tendency toward religion and the religious atmosphere in which he was brought up, he was trained by his father to give from his earliest years. His whole life has been devoted to philanthropy. It is not surprising that this natural humanitarianism should focus itself upon the welfare of the thousands of men employed in the industries associated with his name.

When we consider that from the time he graduated from college the junior Rockefeller has always known that at any moment he might be charged with the entire responsibility of carrying on all of the various enterprises over which his father exercised control, of protecting his interests in all the others, of properly investing his surplus income and safeguarding the investments previously made, of carrying on his father's vast philanthropies, and of framing industrial policies which would have an immediate and direct effect upon hundreds of thousands of his fellow human beings, the parallel between this young man and the imaginary hero of Couperus's novel "Majesty," the youthful Prince Othomar, looking forward with dread anxiety to the responsibilities of his impending kingship, becomes apparent if not striking.

The same changes had come over the world dur-

ing the reign of the mythical King Oscar as during the lifetime of the elder Rockefeller. New ideas—some of them iconoclastic and violent—had become current. It was recognized in silk stocking circles that labor had sometimes not been treated as equably as it might have been in the past. The masses stirred and became articulate through a horde of professional uplifters, reformers, sociologists, and labor leaders, many of whom were sincere and some of whom were even sound in argument and conservative in statement. The leaders of big industry began to take a sudden interest in “welfare” and “social service.” But while this was good enough for the hoboes who pretended that they wanted to sleep on pew cushions, it did not satisfy the self-respecting radical, who refused to accept as charity that which he claimed was his of right and who was blatantly communistic or syndicalistic until the Russian débâcle tempered his outcry to one for government ownership.

Then a few old-timers came to recognize that there was something in the “brotherhood of man” idea—even from a business point of view. It became fashionable to talk about applying the “Golden Rule in Industry.” A lot of business men all over the country hopped upon the tailboard of the philanthropic band wagon and shouted through their megaphones that they were going to do it. For a while it was a pretty good “ad.” Half of those who were shouting the loudest couldn’t have told what the Golden Rule was. Anyhow, they all had different ideas about it.

Now, inasmuch as the world has always—biologically, economically, and socially—been organized on a competitive basis since long before the dawn of history, and since accumulated capital alone has made civilized progress possible—most of us are content to sidestep the matter and applaud on general principles every man who announces that he is going to apply the Golden Rule to his business or Christianity to his factory, without bothering our heads over what the Golden Rule as applied to industry really is.

Young Rockefeller believes that the Golden Rule can be so applied that it will solve the problems of business just as it will in every-day life. He says he never yet has been confronted with one of which it could not prove the solution. When the richest man in the world says that, it is worth listening to.

What does he mean by it? Does he mean that every man ought to strip himself to the buff and give away his clothes? Divide up everything all around? By no means! The Golden Rule to which he pins his faith is the Rule of Justice, of looking out for the other fellow as well as for yourself, of regarding the working man "as a human being first and a member of industry afterward." He thinks that is good Christianity and good business. He believes that the more that capital looks after the interests of labor, the more profits there will be for capital. He says it's nonsense for two men who are essentially in partnership—allies—to stand glaring and shaking their fists at one another if they expect to get any-

where. He thinks that capital, labor, management, and public all ought to be represented in the control of big industry and have a voice in its policies.

There is no slush or sentiment about his attitude. He is a hard-headed business man in business, and a hard-headed business man in philanthropy too. This "brotherhood of man" he believes to be a sound proposition. He is of the opinion that labor has often been denied its rights. He thinks it shortsighted to make labor fight for what is just, and that capital should of its own accord find out what is equitable and see that labor gets it.

But—and here is the main point—he says Christianity demands that the welfare of society as a whole is the first thing to be considered, and that if the worker can't have a decent place to live, short enough hours for rest and recreation, wages sufficient for health and comfort, and still pay six per cent, then he for one is willing to take five, four, three, two, one, or a half of one per cent instead of six, in order that the laborer may have his due. The only qualification is that when the returns fall below a certain point the enterprise will cease to be productive and die, as he says it then should. In a word, Rockefeller, who to most people is the symbol of capital, is preaching its duty to labor. An interesting situation, is it not?

He has his scheme of industrial representation working in the Colorado Fuel and Iron Company, the Standard Oil Company of New Jersey, the Standard Oil Company of Indiana, and in parts

of the Consolidation Coal Company in Somerset County, Pennsylvania. Why doesn't he introduce it everywhere? Simply because neither he nor his father owns or controls any business enterprise whatsoever. Fifteen per cent is the maximum of their holdings, except in the Colorado Fuel and Iron Company, where they have forty per cent. But he is working all the time to make his associates see the light, "boring in," "plugging along," exerting a "moral pressure," which I fancy is substantial enough!

The junior Rockefeller has inherited a keen acquisitive instinct, which shows itself in his insistence upon productivity in all his investments, including his philanthropies. The older man had to fight poverty; the younger is fighting wealth. He is glad to give it away but he insists on its paying dividends in human benefit. There must be a profit in both the getting and the giving.

Of course the younger John gets no thrill out of his money. He is a simple, retiring, hard-working hyper-conscientious fellow, who takes his wealth and his duty toward it seriously. It bothers him. What pleasure he has consists in walking, driving, playing his violin, and occasionally dancing a little. But as far as money is concerned he has no interest in it; and in fact what we call Rockefeller's *money*—in contradistinction to Henry Ford's— isn't money at all. It is only a comparatively small bundle of papers in a drawer in a safe deposit vault down on Beaver Street, New York City. Those papers represent

investments in productive industry making "goods" for the public and "wages" for the worker, the profits of which are almost automatically reinvested in the same or similar enterprises making more goods and giving more employment. John Rockefeller never has more than \$50,000 cash balance available in his banks at any one time; Henry Ford will leave a few millions around most anywhere!

You see, as the years have gone on and the millionaire era has become the billionaire era, the virus of acquisition has built up its own antitoxin. People now have a great deal more sense about money than they used to have. They know that no matter how much man has he can't eat it or drink it up or wear it out himself; that beyond a limited amount there is small profit in its possession. We're a good deal calmer and a good deal less mad about getting money than we used to be; and at the same time we have lost that antagonism and distrust of capital—unhappily much of it then justified—which culminated in Roosevelt's time. Income and inheritance taxes of themselves play havoc with great private fortunes.

We are glad to have a good fellow like young John Rockefeller administer what is left for our benefit. The people of the United States gave the oil and all the rest of it to the Rockefellers, and now the Rockefellers are giving it back multiplied a thousand times in health and scientific progress.

The public hatred of wealth has subsided. In many quarters has come instead an anxiety lest we

are tending by legislation to impair ambition, destroy initiative, and cripple productive accumulation. A lot of people are wondering what the ultimate outcome of the socialistic attitude toward private property on a big scale is going to be. How long is it going to take for that same attitude to extend to the ownership of property on a smaller scale? What is sauce for the big property man may become sauce for the little one before very long.

And where does Henry Ford come in? There is little that people don't know about him, from "Model A" down to Edsel's new Packard. On the other hand, few appreciate his real significance. Where is he going to land us? Ford's ambition is to build and market a hundred million automobiles so that every child will have one. His "vision" is for a world where everything is done by machines. His perfect man would press a button by the side of his bed and find himself automatically clad, fed, exercised, amused, and put to bed again. Thirty minutes' work for each of us a day would be enough, he says, to keep civilization going. Pish-posh, Henry! Does anybody suppose you would stop until you'd eliminated the necessity for all work whatsoever? Of course you wouldn't! When you have rearranged everything so that the human "robot" can sit on his front porch and talk to another "robot" friend a thousand miles away on his eyeglass string, mow his farm in Mongolia and milk his reindeer in Nova Zembla by wireless, hear and see what is going on upon the other side of the world by looking at a shirt

stud, transport himself through the air on a broomstick, and kiss his wife and best girl by radio—will he be any better off? Before we had motors in New York I used to go down-town in a rattling old surface car that took half an hour; but now in your cabriolet, even if you've reduced the price to \$590.65 F. O. B. Detroit, it takes an hour. Have I gained anything? Somehow I feel as if I'd lost a little of my liberty. I don't want a nickel-plated stomach or an oxidized liver. I don't want to sit in one place and be artificially respired and exercised, in order to keep my blood in circulation. I like to work. I like to earn my bread by the sweat of my brow because it makes me hungry to do it that way. For if, Henry, everything is done for us, what eventually are we going to do?

The Billionaire Era is a cycle of seventy years—the span of one human life! From Commodore Vanderbilt with his little rowboat to Henry Ford—from admiration to hatred, back to wonder and respect! In the interval between the Civil and the World War the relations of capital and labor have been revolutionized. To-day the problem confronting our new millionaires is not how to squeeze the employee, but how to give him all that is justly his in a capitalistic world in which the competitive system is firmly, and probably permanently, entrenched.

How will the present prototypes of our only equivalent to royalty in America be recalled? Will they be pictured as amassers of tainted fortunes or

as trailing clouds of philanthropic glory? Will they be praised as the initiators of labor policies which brought "humanity" into industry or cursed as Frankensteins who, by the universal introduction of supernatural machines, eventually substituted machinery for humanity itself?

XIII

“A MAN BORN TO BE HANGED CANNOT
BE DROWNED”

INTRODUCTORY

The facts set forth in the following narrative are proof positive of the truth of the adage that a man born to be hanged cannot be drowned. They also point to the fact that there are worse fates than hanging and many things worse than dying. We are all of us, as Victor Hugo pointed out, persons condemned to death and living under an indefinite reprieve which may be cancelled at any moment. Is it not strange that the man who escapes drowning should congratulate himself on having outfooted predestination instead of concluding that he was born to be hanged? Happy because he did not painlessly find oblivion beneath the waves, when he is likely within a few days to face death either on the scaffold, the highway or in the hotel dining-room? Let us eat and drink, walk under ladders and sit thirteen at table, light three cigarettes from a single match and go in swimming immediately after dinner, confident that if we are destined for the electric chair naught can harm us.

XIII

"A MAN BORN TO BE HANGED CANNOT BE DROWNED"

RED KELLY, by the merest fluke of fortune, had just happened to step over to the cigar counter in the rear of the crowded saloon at the precise moment that Detective Sergeant Hennessey glided between the folding doors and laid his hand heavily on the shoulder of the Buffalo Kid, who was sitting at a small table near the window. Instantly Kelly dropped into concealment amid the ice pails behind the bar.

"How d'y, Kid!" remarked the detective good-naturedly as he slipped the slender steel bracelets over Buffalo's wrists. "Where's your side-kick—Kelly?"

"Hello, Hennessey," returned the Kid without a quiver. "Kelly? Haven't laid eyes on him for a month!"

Hennessey grinned.

"Not since yesterday, eh? Got any of the Texan's dough in your pants?"

"Quit yer kidd'n', Hennessey," whined the little strong-arm man. "You know I ain't been down the river only five weeks! Do you think I'm lookin' to break right back into stir?"

Kelly from his hiding place could hear every

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word of this interesting conversation and grew more uneasy each moment. McFarland, Hennessey's side partner, was probably outside, and might be expected at any instant. And him only out—like the Kid—just five weeks! The Texan must have come to suddenly and remembered their description. He would have to beat it out of town—unless they were watching for him at the railroad stations.

Through a crack he could see the Kid frantically giving him "the office" with his foot. He crawled on all fours to the end of the bar, quietly pushed up the bottom sash of the rear window, and writhed out like a snake on to the fire-escape.

It was but a single leap over the fence into the next yard, and from there he sneaked through the back hallway of a tenement and gained Doyers Street. But Chinatown is always full of "fly-cops" and "gum-shoe" men, so he beat a retreat through Yen Lee's restaurant, across Mulberry Park, up past the Tombs, and landed safe at last on the down-town subway platform at the Worth Street station.

A train was just pulling in. He boarded the forward car and sat himself down beside the motor-man's little coop, face forward.

Yes, the Texan must have come to! There could be no other explanation of the Kid's unceremonious taking off. They would be looking for him all along the line, and if they caught him it would mean ten years. He had accumulated no "fall money," and he therefore would have to put up with one of those lazy shysters—"counsel assigned"—who would

either double-cross him or jockey him into a plea of guilty.

Kelly had made up his mind before the train reached the Brooklyn Bridge that he must make a getaway or the usefulness of his metropolitan career was ended. He saw now that he had been a fool to try to do business in the old barg; he should have hit out for Chicago or St. Louis. But the Texan had looked so easy—drunk and flashing his wad on every one who came along—that the temptation had simply been too strong. Yes, he must keep away from the railroad stations; they were always the first places covered.

At the Bridge he lost himself in the crowd and entered a Brooklyn train almost by instinct. He knew there was a row on between the Brooklyn Chief and the Second Deputy Commissioner at headquarters in New York. He would take a quiet walk and think things over down by the water-front. Luckily he had had lunch—a free one at the saloon: herring, crackers and cheese, a couple of sardine sandwiches, and a fistful of pretzels. He remembered it all exactly afterward—item by item. And he had had five beers with the Kid. In his shoe was the hundred-dollar bill that had been his share of the swag. So far so good!

Kelly got off at the first stop and worked his way by unfrequented streets down to the water-front. Everything there was strange to him, like some foreign country, for his own beat had always been the Bowery.

He ruminated disgustedly over his ill-luck. He had done two bits in six years! If they nabbed him again he would surely get the limit—"second offence," probably. No, New York was no place for him! But how to fade away?

He lighted a cigarette and with hands in pockets sauntered nonchalantly along the cobblestones of the alley behind the warehouses. Great drays, drawn by stalwart Percherons with full whiskers on their ankles, were unloading at the wide-open receiving doors. There was a strong smell everywhere of tar, cordage, molasses, and dried fish. Sailors sat sunning themselves on bales of cotton and boxes of food-stuffs. A wagon laden with green bananas bumped by. Two of the bananas were knocked off against the wheel and fell at his feet. Mechanically he picked them up and ate one. Afterward he regretted this act of rashness, but at the time the banana was singularly comforting to his soul. The other he stowed away in his side pocket for future reference.

Beyond the warehouses were the wharves themselves, swarming with stevedores, each trundling a truck containing a box, barrel or bag of something until he came to the top of the gangplank, when he would take a running start and go coasting down behind his burden straight into the black orifice of the steamer's vitals. Kelly, with his derby hat on the back of his head, watched them scornfully. It was wonderful how little those fools seemed to mind hard work!

He had heard of stowaways, and some of his companions in Sing Sing had recounted miraculous escapes from the hounds of the law by hiding in the hold of some outward-bound freighter, but even had he so desired, Kelly saw no opportunity to put the idea into execution. However, the idea began to gain hold on him that perhaps in some way the sea could be made to minister to his purposes. The nearest he had ever been to an ocean voyage was to take a trip with a couple of dips up the Hudson on the *Mary Powell* to work a Sunday-school convention at West Point. But he had often talked to sailors in the saloons along the Bowery; and he knew the names of some of the ports to which they had sailed.

As he trudged on, he became more and more convinced that simply to board a steamer for foreign parts was the solution of his present difficulty. But which one?

A short distance ahead, a painted wooden arch marked the entrance to a pier, and through it wagons, trucks, and miscellaneous vehicles were coming and going in both directions, giving the place an appearance of extreme activity. On the arch was painted in yellow letters on a blue ground:

STR. GEN'L GOMEZ.

ORIENT LINE.

TO THE AZORES, FAYAL, MADEIRA, LISBON, TANGIER
AND ASIATIC PORTS.

The names sounded romantic and alluring. "And Asiatic Ports!" Hennessey would never get him in an "Asiatic port." None of the places were familiar to him, but he had once tasted Madeira, and this decided him. He would take a trip to Madeira and disappear until the police had forgotten all about his little trouble with the Texan. If he got tired of it, he would take a steamer back the next week or continue his travels to the Asiatic ports.

The *Gen'l Gomez*, lying at the dock, with her smokestack and superstructure towering above it, seemed an enormous thing, solid, permanent, and immovable. He was impressed by her stability and elegance.

On a barrel at the side of the arch sat a weazened little fellow in a faded blue suit, wearing an immense gold-braided cap pushed down over his ears, which thrust them out on either side in a fashion that made him look like an organ grinder's monkey.

"Hullo, cull!" said Red, approaching him in his most winning manner. "Wot's the price of a ticket to Madayra?"

The monkey, who was as brown and wrinkled as one of those nuts Fong Dung sold over in Mott Street, looked Kelly over patronizingly.

"Hey, you!" he volunteered, less in interrogation than assertion. "You no wan' go Madeira, eh?"

Kelly boiled. What business had the little piker to question his intentions?

"I don't, eh?" he shouted, thrusting his chin into

the face of the pigmy on the barrel. "I'll show you do I want to go to Madayra or not—yer sawed off little runt!"

But the runt, unperturbed, merely blew a cloud of smoke in his face.

"You no got da mon'!" he announced.

Kelly gave vent to a noise like a donkey engine blowing off steam.

"A-a-h-h-h! I ain't—ain't I? How much?—Combeen?—Cuanto?"

"Forty-t'ree doll'." He treated Kelly as dirt under his feet.

"Aw! Wot's forty-t'ree dollars," sneered Kelly.

"You no got, anyhow," challenged the other.

At this moment Kelly became convinced that his entire happiness and safety depended solely upon securing passage on the *Gen'l Gomez* to "Madeira and Asiatic Ports." But the Texan's hundred-dollar bill was in his shoe, and it would not look classy to disrobe before the runt.

"Ptft—ah-h!" he remarked scornfully, and sauntered away to where the warehouses cast a deep shadow behind a truck.

The bill was still intact, and having refolded it and placed it conveniently in his waistcoat pocket, Kelly strolled back to the barrel. Casually he produced the hundred-dollar bill. Instantly the runt sprang off the barrel.

"You wan' go to Madeira, mister?—Thees way, saire!"

He waved Kelly under the arch and preceded him

like a drum-major to the gangplank. The new passenger followed with an accession of pride.

A stocky man with a square, whitish beard and a red, corrugated face (also in a gold-braided cap—marked "Captain," this time—yet in shirt sleeves and suspenders) blocked the way to the deck, eyeing Kelly with suspicion.

"Who you got there, Manyel?"

"Dees gent, he wan' go Madeira," answered Manuel respectfully.

The stocky man muttered something *sotto voce* in Portuguese, and the runt nodded.

"Give him the bridal suite," said the captain.

Kelly looked to see if he was being made small of, but there was no sign of humor on the captain's face. Resembling as he did the warden at Sing Sing, he frightened Kelly.

"Gotanny trunk?" he inquired.

"Comin' later," replied Kelly in a flash of inspiration.

They crossed a promenade deck at least four feet wide, and entered a small saloon, from the centre of which a narrow circle of steps descended abruptly to lower regions. At the top of the escalier stood a fly-blown imitation palm. The whole place smelled of onions. Manuel unlocked a door, disappeared inside, and threw open a window labelled "Purser." Presently his face reappeared in the opening, and he thrust forward a pile of heterogeneous coinage and a blue ticket several feet in length.

"One firs'-class tick' to Madeira," he murmured and shut the window with a slam.

Kelly pocketed his change and stuffed the ticket into his hat-band, as is customary among the elite. No one could harm him now! He felt confident that on some principle of extraterritoriality he was beyond the reach of Hennessey and all his tribe.

“You come ‘long,” ordered Manuel, emerging from the door.

Kelly followed obediently. The purser, jangling a bunch of immense keys, led the way forward along the deck and opened a small, badly ventilated state-room, containing a couple of narrow bunks with attenuated blankets, a set bowl and faucet, a tin pitcher painted pink, and a worn oilcloth carpet. A life preserver that looked like a pair of corsets padded with bran was stuffed under a bracket above the berths. The room was about one-half the size of the apartment last occupied by Kelly at Sing Sing, and was odoriferous of stale cork, paint, and rusty tin.

By no means prepossessed by his new accommodations, and having no luggage to unpack, he decided on a tour of investigation. A steam winch was noisily hoisting barrels and crates off the dock and depositing them somewhere amidships. There was a terrific uproar, inextricable confusion.

As Kelly neared the gangplank on this exploring expedition, a stout, masterful lady in black bombazine, with a small black mustache, was wheezing up it, followed by half a dozen gawky, olive-skinned children. The eldest, who looked like a mulatto, a rickety boy of at least eighteen years, was nevertheless clad in skin-tight black knickerbockers. The

other five were awkward little girls. Kelly discovered afterward that she was a Portuguese widow returning to her native country.

Simultaneously his attention was distracted by the sight of a dun-colored cow with a large white face, suspended in mid-air and mooing helplessly. Kelly could not imagine what she was doing there, unless attempting to jump over the moon on a bet, but by hastening amidships he was in time to see her safely lowered on deck into an improvised stall constructed of hundreds of coops containing, as the labels alleged, "Rose-combed white Leghorns" and "Plymouth Rocks." Kelly had always supposed the latter to be pants. The descent of the animal occasioned a tremendous flutter among the poultry, and a prodigious squawking, but the cow was so astonished at being on her feet again that she submitted quietly to being tied into place with a complicated set of half hitches dexterously manipulated by a sailor clad only in white tennis trousers and an undershirt. From among the chickens he looked at Kelly and grinned.

"Milk shake!" he said. "Stow your leg, Melba!"

"Wha'd y'mean, Melba?" queried Kelly.

"We calls her Melba on account of her be-oo-tiful voice," answered the sailor. Kelly was conscious instantly of a feeling of affection for this congenial and friendly soul. He made him think of the Buffalo Kid.

Kelly learned to his horror from this amiable person, that the trip to Madeira occupied, weather per-

mitting, a minimum period of eighteen days. He was inexpressibly pained by this discovery. Eighteen days! He had supposed that one could go to a place like Madeira in a day or two—a week at the most. It was not his absence of wardrobe but the thought of being confined in such limited quarters for so long a period—and him only just out of Sing Sing! Eighteen days!

The cow having been at length lashed firmly in place, and the chickens made shipshape, a varied assortment of dried fish, flour, shingles, and other commodities was packed around them. Buttressed in front, to Kelly's immense joy, were eighteen barrels of raw whiskey. One for every day, thought Kelly. He took great comfort in the whiskey—for purely medicinal purposes. He wished he had some at that moment. He was also ravenously hungry, but an investigation of the tiny saloon below stairs showed that it was deserted except for a multitude of very active flies.

Kelly, for obvious reasons, did not wish to go on shore again. He found a sheltered though cindery seat on a fire-bucket abaft the funnel and, lighting a cigarette, waited patiently for the boat to start. While searching in his pocket for a match, his hand came in contact with the other banana, and he devoured it thankfully.

It was now nearly five o'clock, although the hour for sailing, as advertised on the arch, was half after two; and there was still a quantity of freight remaining on the dock,

Two goats were being pulled down the gangway by their hind legs. They didn't want to go a bit. A sailor received a swift butt in the abdomen, and Kelly collapsed with laughter.

Then he caught sight of a fat negro in a tall silk hat and long frock coat that nearly reached to his heels. The negro carried a carpet-bag worked in green and yellow worsted, while at his side waddled a female counterpart with an enormous unrolled umbrella. They were coming aboard! Kelly was vitally offended. It was inconceivable that these two were to be his fellow passengers! Nevertheless they slowly ascended the gangplank and disappeared into the saloon.

By six o'clock the final barrel of flour, the last crate of canned goods, and the ultimate bundle of dried cod had been brought on board. Already a thick cloud of black smoke was pouring from the funnel, and the captain had put on his coat and gone into the pilot-house. Kelly's heart sang with undiluted joy. They were actually going to start. An unexpected and ear-splitting explosion from the whistle caused him hastily to change his position.

A couple of stevedores cast off the hawsers which connected the *Gen'l. Gomez* with the land of liberty and the home of the brave, and imperceptibly the black line between the steamer and the dock widened. Kelly's heart thrilled with a new and strange emotion. He was leaving the land of his birth! When would he ever see it again? Would he find any of his old comrades on his return? The only one he

could be sure of would be the Kid—up the river? Poor Kid! Entombed in a stifling and noisome prison, while he, Red, would be lying on his back in the sand, smoking Havana cigars and watching the distant sails on the sunlit sea, or picking cocoanuts in the company of lustrous-eyed and scantily clothed maidens in the groves of tropical islands. Poor Kid!

Tears came into Kelly's eyes. He underwent a sudden revulsion of feeling, and thought fondly of his room in the Bowery lodging-house, of the merry evenings in the corner saloon—his “hang-out”—where he shot craps and tossed three-card monte for the edification of the simple-minded rustic. Visions of the dance halls of Canal Street and the lights of Broadway rose before him. He might still leap across the dark green ribbon, churned into white, foaming spirals! He hesitated—but the thought of Hennessey held him back. Curse Hennessey! He was his Nemesis! Only by thus marooning himself in the trackless ocean could he elude Hennessey. And wouldn't old Hennessey be surprised! He'd have his goat, all right! Kelly shook with silent mirth. The die was cast. On to Madeira, to Tangier, and to the “Asiatic Ports!”

The steamer swung out into mid-channel as the autumn sun was sinking behind the towering office-buildings of Manhattan. Astern the delicate, spider-like tracing of Brooklyn Bridge hung across the sky. Long lines of tiny pedestrians, drays, and street-cars crawled over it like flies. Now and then, in either

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direction, one of the elevated trains would hustle over the river. Kelly had never seen it thus before, and he felt gloriously proud of the city wherein he lived, robbed, and had his being.

The steamer shifted her course and the bridge disappeared from view. A Staten Island ferry-boat overtook them and gave them her heels scornfully. Kelly could see the three blind musicians sawing away on the upper deck. He knew them well. They were not blind at all.

They passed Governor's Island—and Bay Ridge. Again he was aware of the gnawing of an almost empty stomach. And then in answer to his prayer for sustenance, Manuel appeared with an immense gong and began to beat it with violent blows. It was supper time! Sweet hour of food!

Kelly tossed his cigarette overboard and quickly descended to the dining saloon, where the other passengers had preceded him. There was a single long table, at the head of which sat the captain, with the Portuguese widow upon his right. Ranged beside her were the Seven Ages of Man represented by her offspring. At the captain's left, to Kelly's astonishment and annoyance, sat the negro gentleman and his wife. Then came a thin woman in spectacles who looked to Kelly like a police matron, a Spanish young man, a Syrian rug merchant, and a watery-eyed geezer with a red nose, beside whom there was a vacant seat. Manuel had already taken his place at the other end. The captain waved his hand at Kelly and bawled:

"Hey, you! Sit next to Doc!"

Kelly, perceiving that Little Bleary Eyes must be "Doc," sat down unwillingly. A negro wearing a dirty white jacket was engaged in passing bowls of soup. Each passenger had a napkin-ring of the Scotch tartan variety. Kelly discovered, with something of a shock, that his bore the number "13."

A deadly silence reigned throughout the saloon, broken only by the various noises occasioned by the passengers in imbibing the soup. This did not disturb Kelly, but he was annoyed by the presence of the colored gentleman on the captain's left, and in his irritation he choked several times in essaying to masticate the boiled cod which followed the soup. He had never encountered so many bones before. And the silence made him uncomfortable. It was like eating in prison, where speech was forbidden. He therefore endeavored to enliven things with a trifle of light conversation.

"Who's de minstrel next to de boss?" he inquired of "Doc."

The bleary-eyed man turned a mournful gaze upon him.

"Whath?" he asked in a voice suggesting that his mouth was thickly padded with cotton wool.

"De guy in black face—hittin' de salt horse," explained Kelly.

"Hey?—Yeth, I gueth tho," replied "Doc" vaguely.

"That is the Liberian consul-general: he is on his way home," whispered the scrawny damsel in

spectacles, in a tone of mingled tenderness and reproach.

Kelly covered his embarrassment by vigorously attacking the pork which had succeeded the cod. It had a peculiar taste. So had the butter. He had never eaten anything like them in Sing Sing. And he broke a tooth—a good one—on the water biscuit.

“Hell!” sputtered Kelly, holding up the fragment for the edification of the company. “Split me molar!”

At this unexpected sally the school-mistress uttered a suppressed shriek and the Liberian consul turned with dignity and rolled his eyes in the direction of the broken tooth.

“Most extr’ord’n’ry!” he exclaimed in the enunciation of an English guardsman.

The captain rose in his chair and glowered upon the unfortunate Kelly.

“No swearing on my ship!” he bellowed. “There’re ladies on board. D’ye hear? Not a damn cuss!”

Kelly, chagrined, placed the tooth apologetically inside his napkin-ring.

“Take that thing off the table!” roared the captain.

Kelly put it in his waistcoat pocket. He felt exceedingly uncomfortable. You couldn’t act natural at all! There was a cabbage course, and in his confusion, although he had never liked the stuff, he gorged himself with it. He began to be very thirsty, but his confidence had deserted him, and he furtively filled his tumbler from the dingy yellow carafe before him.

It was very hot down there in the saloon, and the kerosene lamps gave forth a curious rancid smell. Kelly felt slightly dizzy.

A creaking of the woodwork became audible, and the schoolmarm, with a muffled “Excuse me!” hurried up the stairs. The water in the carafe swayed gently from side to side. Kelly became conscious of a stuffed sensation in his stomach. The floor seemed to be rising and falling beneath his feet as if some pulpy sea animal were wallowing about there.

But he ate on, through the oily salad, the sago pudding, and the bananas. Bananas again! The captain separated his beard carefully, wiped his mouth with ostentation, rolled his napkin, pushed it through Tartan Plaid No. 1, and with a final glare at Kelly climbed out of the saloon. The others also folded their napkins and silently stole away.

Kelly was left sitting alone with Manuel, who was cynically devouring myriads of bananas. Somehow Kelly was not anxious to arise. A clammy perspiration had exuded upon his forehead and his gastrointestinal tract seemed to be full of grape-shot.

Something told him that this was not the place for him. The grape-shot had struggled upward toward the light and were now in the neighborhood of his Adam’s apple. The table and chairs, the carafes and tumblers, the crumbs and napkin-rings, the remnants of the sago pudding and the discarded banana skins danced up and down before him. He staggered as he made for the winding stairs, and a moan escaped his set lips.

"Mister—bet' go lay down, saire!" Manuel called after him.

Kelly needed no advice in this regard. All he wanted was to avoid further sight of nourishment.

As he tottered out upon the deck into the fresh ocean breeze he was aghast to find that they were almost out of sight of land. The sun had long since gone down and only a yellow glow showed in the west. The *Gen'l Gomez* was rising and falling on the long swell, burying her nose deep and then lifting it high in air. Behind, Kelly could see a cluster of lights, which he judged to be Coney Island, but ahead, to right, to left, there was nothing but a vast, lowering, black ocean, moving uncertainly and offering no guarantee of stability. He forgot his nausea momentarily in the surprise incident to his discovery that the *Gen'l Gomez* was so small! She seemed but a fly-speck on that limitless, heaving expanse. He was horror-stricken at having trusted himself to such an insignificant cockle-shell of a boat. What if a whale bumped her?

Coincidentally with these meditations, the course changed, and the steamer began to roll heavily. Kelly became convinced that they were going to turn turtle. Clinging to a stanchion like a stout tom-cat in a derby hat, he plunged down toward the green water and then unexpectedly found himself climbing, climbing toward the zenith.

"Gee!" he murmured. "Talk about switchbacks!"

Up he rushed through space until the *Gen'l Gomez* and her cargo were far below him, the sea a vague

and infinitely distant abstraction. Even when his body started down again, his soul continued its upward flight.

And then he unexpectedly discharged his grape-shot—just at the psychological moment, precisely as a gunner fires on the crest of the upward sweep of the muzzle’s trajectory. Instantly he felt an unutterable relief and a terrible weakness, accompanied by an excruciating agony in his abdomen, as if he had parted with some of his vital organs. If he could only lie down! The thought of finding his stateroom and fitting the key into the lock struck him as an impossibility. But he must wedge himself in somewhere.

Kelly, on all fours, crawled slowly amidships, uttering feeble groans. The deck was deserted and darkness had fallen. He felt terribly alone and helpless. The immensity of the universe seemed unbearable. Then a familiar smell enveloped him like a mother’s sheltering arms. It grew stronger, filling his soul with comfort and giving his heart new courage, like the breath of the oasis to the parched wanderer in the desert. His hand came into contact with a whiskey barrel. He lay there for some moments, his nose pressed against the bung-hole, blissful in his mere proximity. He stretched out his arms and gathered himself to the barrel’s breast.

He was brought suddenly to himself by a lurch of the whiskey barrel, accompanied by a prolonged bellow from Melba. The *Gen’l Gomez* was acting in a most peculiar manner. The wind was whistling

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among the chicken coops, and the feeble glow of a wildly swinging lantern cast a ghostly light over the cowering poultry. The darkness was Stygian. Great geysers of spray rattled down upon the forward decks, and an icy brook eddied round his legs. He could hear distant shouts—frantic and hopeless; they sounded as if all were lost. Kelly made sure that they were going down, and wondered vaguely how long he could manage to keep afloat on a whiskey barrel.

Suddenly the *Gen'l Gomez* rose up and stood on her hind legs. For a moment she hung in mid-air as if meditating falling over backward; then, apparently thinking better of it, she plunged downward until Kelly could feel the chicken feed dropping all about him. The barrels strained and groaned, the poultry squawked, the cow bellowed in terror. The descent toward the bottom continued indefinitely.

On either side, mountains of white and black rushed by in blinding streaks. There was a tumult all about him. With a sideways scoop the *Gen'l Gomez* shot upward again, and the water poured on board over her bulwarks until Kelly was almost suffocated. Added to this he felt a renewed and deathly nausea. It was something about the chickens.

The wind had risen and was buffeting the rotten superstructure until every door, window, and blind rattled and banged in a concert of agony. The *Gen'l Gomez* hesitated, wobbled, ducked, jumped into the air, sank down and backward with a curious

spiral motion, and wriggled like a snake. Kelly was convinced she would break in two and leave him and Melba, surrounded by chickens, floating in the ocean together. The play of the whiskey barrels became greater and greater. The ropes which bound them stretched and the knots loosened as the steamer staggered this way and that. Presently the whole mass was yielding a few inches with every roll. Kelly became petrified with a new fear. The barrels might slide down upon him and crush him to death. There was something disgusting about being crushed by the outside of a whiskey barrel! If he could only get behind the barrels he would be safe!

Shaking as with an ague, he worked himself over the tier and fell upon and among the chicken coops. Yes, it *was* something about the chickens—and about Melba also. It was almost worse than the thought of annihilation by the barrels. The *Gen'l Gomez* seemed to have given up the fight. At the mercy of the storm, she wallowed on her side until Kelly could maintain his position only by clinging frenziedly to the slats, while feathers and grain showered him.

Now he was down, heels in air; the next moment he was projected through the night as from a catapult, the helpless victim of centrifugal force. The chickens no longer squawked, but flopped in a limp, sodden mass from one side of the coops to the other. Melba had fallen into a reclining position, and was sliding to and fro, held only by the guys attached to her legs, bellowing hideously.

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Kelly was momentarily in danger of being thrown off the coop upon which he lay, for the laths cracked and broke at every strain. In one of his lucid intervals he wondered if the whole eighteen days and nights could possibly be like this. It seemed incredible. Yet he acknowledged an utter ignorance of the ways of a ship upon the sea. A hen bit his middle finger. He began to pray, although he had not prayed for thirty years—a jumble of the services he had heard in prison, words from all creeds and denominations indiscriminately and impartially combined.

He was but a torn, soaked, and disreputable remnant of the Kelly that had been. He wanted only life. Life under any other circumstances seemed unutterably sweet.

At the apogee of his elevations Kelly would find himself directly above Melba—almost astride her. The next instant her forelegs were entangled in his coop and her white face was thrust from out of the darkness almost into his. She seemed as big as a hippopotamus—and just like one. Another moment and she would be below him again, receiving the discharge from the full battery of coops.

It was then that a terrible thing happened. Without warning, a rope slipped and everything went at once. In one terrific crash the whole mass of Kelly, coop, and chickens broke away and descended with the ease and velocity of a plunger elevator upon the unfortunate Melba. She met the charge bravely, struggling headlong into the complicated mass, and as he flew by, Kelly wildly clasped her about the

neck. For a single instant they remained thus as the avalanche of chickens broke over them and passed on. Then with a super-bovine effort, Melba freed herself. The chickens had shot out of sight toward the stern. They did not return as Kelly expected when the bow dropped again—only Melba and himself, in a close embrace, coasted swiftly forward against the whiskey barrels. For a second or two they hung there. Then as the stern settled, Melba, followed by a gyrating Kelly, slid backward in a dignified sitting posture in the direction taken by the poultry. There was nothing to be done except to hang on to the nearest thing—which was Melba. She was on her haunches, her forelegs stiff and taut, with the remains of Kelly dangling from her throat. It was marvelous how she maintained herself, but some law of gravitation enabled her to go sliding around like a dignified pyramid.

Kelly perceived that his last hour had arrived. The next slide and he would be a sandwich and Melba would be pressed beef. He was jerked unexpectedly away from Melba by a rope cast about his feet. A dozen sailors threw themselves upon the helpless animal and pinioned her fore and aft.

“What yer tryin’ to do?” exclaimed the deck-hand, lifting him to his feet. “Milk her?”

“Oh!” hiccoughed the breathless Kelly. “Oh!”

“Better duck for your bunk!” advised his friend.

“What’s yer number?”

“Bridal suite,” whispered Kelly.

The deck-hand guided him forward along the

heaving deck for a hundred-odd feet, and tried a door. It opened.

"Here you a ' he yelled above the howling of the storm. "Hit the slats!"

Kelly needed no urging but, eager to obey, jumped inside. The deck-hand slammed to the door. For a moment Kelly fancied himself in a sound-proof vacuum. But only for a moment. It was no vacuum!

He remembered absolutely the position of the berth, and without removing his garments he climbed in laboriously. There was something soft and podgy in there. He wondered at the largeness of the pillows but tried to accommodate himself to them, when suddenly a stern female voice inquired:

"Is that you, Moses?"

Kelly held his breath while the sea lifted him up and forced him down again. Then a clammy hand was laid upon his neck.

"Moses! Moses!! It's a man!"

Kelly leaped to his feet and felt for the door, but it was pitch dark and his head was whirling. He had just savagely encountered the washstand when somebody struck a match, and the shining face of the Liberian consul-general, surrounded by a penumbra of white nightcap, peered down from the upper berth. Kelly instinctively waited for him to exclaim "I'se in town, honey"; but instead, he merely remarked in the accents of Grosvenor Square:

"Most extr'ord'n'ry! Kindly remove yourself!"

A blind and primitive rage took possession of Kelly.

"You big black-faced boob!" he shrieked, shaking his fist while he clung to the set bowl with the other. "You big buck Ethiopian!" Other words failed him.

"I shall report your language and conduct to the captain! You are an impertinent fellow!" replied the consul. "My wife is in the lower berth. Again I call upon you to retire."

"Bth—rr!" said Kelly, making a face at him.

He found the handle of the door and plunged into the outer darkness.

"Wish I was dead!" he groaned. "Wish I was dead!" And, as if in answer to his wish, he again surrendered unconditionally to Neptune. There had been something about the Liberians also!

The waves were pouring over the rail and he waded ankle deep as he again sought the handle of the door to the bridal suite. This time he found it, for he made sure there was none other beyond, and he threw himself into the upper berth, first carefully feeling in it for other occupants. The pillow was a sachet bag about a foot square, and the blanket a doily. With a shudder he wound it about his extremities and turned his face to the wall.

The storm banged upon the door for admittance. The slats of the bunk sank and rose, rattled and shook. The tin water pitcher had leaped to the floor and was now rolling hither and yon with every lurch of the ship, and the corset-like life preserver fell on his face and half smothered him. He hurled the thing away from him with a stifled yell, and buried

his face in the satchet bag. If only death would come quickly! Such torture was unendurable even for five minutes longer. Eighteen days!

And while the *Gen'l Gomez* continued to writhe and squirm in her grapple with the storm, Kelly passed into a coma of exhaustion.

When he came to himself the little cabin was bright with sunshine. Tiny globules of light danced and mingled together upon the white paint of the ceiling just above his head. The gentle lap of the waves against the side of the steamer was soft and soothing. There was no motion of any sort. The storm was over.

He got up and looked out of the window. They were tied up to a wharf and the steam winch was hard at work. He felt light in the head and all drawn out inside. His dollar watch said seven o'clock. Where could they be? They must have reached Madeira, and him unconscious the whole eighteen days! No wonder he was hungry. Hungry? He was famished. He had a right to be!

Beyond the wharf he could see a row of sheds and a couple of high wooden buildings, one of which bore a sign reading, "Bananas—Wholesale." Kelly turned faint. Bananas! Well, thank God! here they were, anyway! He would be free—rid of the terrible sea, and the *Gen'l Gomez*. How fresh and sweet the air tasted! How beautiful the row of wooden sheds! How delicious the sunshine! The tears filled Kelly's eyes. He would never, never leave dry land again as long as he lived. No Asiatic Ports for him! Ma-

dayra would do. There would he live, and there would he die. Only let him once get ashore—! A new life in a foreign land! Where the past and all his crimes were wiped out! He might even marry and settle down to some light housework. Rear a family of little bronze-colored Kellys. And his declining years could be spent dreaming among the banana trees—no, not banana, *yam* trees—surrounded by attentive offspring.

Then he saw Hennessey sauntering on the dock, smoking a cigar! Hennessey! It was inconceivable—an illusion caused by his mental suffering. He drew back his head swiftly and his breast resounded with the hollow beating of his heart.

Hennessey? Cautiously he peered forth again. The vision was still there—blowing its nose.

Gradually it dawned on him that it really must be Hennessey. But how could Hennessey have got to Madayra? Unless he had come on the *Gen'l Gomez*, and then Kelly would have seen him. There he was—anyway! Kelly perspired with a familiar fear! Perhaps—perhaps—they were *not* in Madayra.

The friendly deck-hand was at work a few feet! away, and Kelly beckoned him to the window.

“Say, cull,” he whispered hoarsely, “where are we?”

“Boston,” answered the sailor.

Kelly looked at him dumbly. He surely must have heard him wrong!

“*Bos-ton?*”

“Sure, Boston. We always put in here for a load of canned beans.”

Kelly's jaw dropped. Boston! Beans! And so they were not in Madayra at all! He was caught like a rat!

Hennessey must have tracked him to the dock, ascertained that the *Gen'l Gomez* was to touch at Boston, and after a comfortable dinner, taken the midnight train to the Hub. Wouldn't that jar you! Now he was merely waiting for his prey to go ashore and, if not, he would leisurely search the boat.

There was not an instant to lose. He must find some remote, unsuspected corner of the vessel and conceal himself—the coal bunkers, perhaps. Quivering like a rabbit, he crept on hands and knees out of the stateroom, around to the other side of the deck and thence amidships.

Melba was standing weakly amid the whiskey barrels. At sight of her, the horror of the night rushed over him. Melba! He could not bear to look her in the face. The chickens were gone. He turned pale at the recollection of the night and retreated to the saloon.

From the door came a sickening smell of onions, cabbage, boracic acid suds, and bananas. The sunshine suddenly grew black for Kelly. It was like the door of a charnel house. His legs refused to enter.

But he must go somewhere! He hurried back along the deck, but just in front a door opened and he found himself in collision with the Liberian consul, who cast upon him a look of dignified and frigid disapproval. Kelly gave it up. It was no use! The whole boat was like a "bug-house." He couldn't

stand it another minute. Eighteen days more in a coal bunk?

The face of Hennessey rose before him like that of a ministering angel. Good old fat, comfortable, cheery Hennessey! And the blessed solid land! What a night it had been! He hesitated. Vivid memories flashed across his mind—that awful meal in the saloon, the sago pudding, the salad, the captain, his tooth, the heaving decks, the wild rage of the hurricane, the cataclysm of the chickens, that fearful death waltz with Melba, the Liberian consul and his fat wife——

Kelly took a deep breath and walked resolutely around to the other side of the boat. With one joyful leap he landed safe upon the dock.

“Hello, Hennessey!” he said. “It’s me—Red! For God’s sake take me back to Sing Sing!”

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